In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES OF AMERICA, PETITIONER, *v.* THE TRENTON POTTERIES CO., ET AL. } No. ——

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The United States of America submits its petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decision of that Court in the above-entitled cause.

STATEMENT OF THE CASE

On the eighth day of August, 1922, an indictment was filed in the District Court of the United States for the Southern District of New York against The Trenton Potteries Co., Thomas Maddock's Sons Co., and forty-five other defendants, both corporate and individual, for a violation of Section One of the Act of July 2, 1890, entitled, "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies."

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The indictment contained two counts. The first count charged the respondents who, it was alleged, manufacture more than eighty-five per cent of all the sanitary pottery in the United States, with unlawfully engaging in a combination and conspiracy in restraint of interstate trade and commerce in sanitary pottery, and that in pursuance of a common plan and agreement among them so to do they fixed arbitrary and noncompetitive prices for the sale of that commodity. The second count, after reciting the preliminary facts, charged that the respondents, in pursuance of a common plan and agreement, limited and confined their sales to a special group whom the respondents denominated as "legitimate jobbers."

The case was tried before the Honorable William C. Van Fleet, and on the seventeenth day of April, 1923, the jury found a verdict convicting the respondents on both counts. A writ of error was sued out from the Circuit Court of Appeals, which on the sixteenth day of May, 1924, reversed the judgment of the District Court.

The Circuit Court of Appeals in the opening paragraph of its opinion refers to the facts in the case:

> It is not necessary to review the facts at large; sufficient to note that the subject matter of prosecution is a trade agreement to maintain a central bureau of information, disseminate knowledge of prices, customers, discounts, etc., obtained thereby, and *thus persuade or induce the large number of sanitary*

pottery manufacturers who belonged to the Association to conduct their businesses in a reasonably uniform manner as to prices and discounts, and protect the jobbers who contributed their largest normal "outlet."

While differing in detail the scheme condemned in *Eastern, etc., Association* v. *U. S.* 234 U. S. 600 and *American Column, etc.,* v. *U. S.* 257 U. S. 377, may with sufficient accuracy be said to suggest the sort of combination alleged by the Government to have been formed by these defendants.

The Circuit Court of Appeals, however, held that though the jury found that the price-fixing agreement was made, there still remained a question *of fact* for the determination of that jury, *whether such an agreement constitutes an unreasonable or undue restraint of trade.* The Circuit Court of Appeals also held that criminal liability under the Sherman Law is dependent upon proof of injury to the public, and that whether such injury was inflicted was another question of fact that the jury should have been asked to determine. This in effect would substitute the composite opinions of twelve jurymen as to what should be the law of the land for a great statute enacted by Congress.

THE QUESTIONS INVOLVED

(1) *Is it a question of fact for a jury* to determine whether a price-fixing agreement, entered into by a combination controlling more than four-fifths of an industry, and engaged in interstate trade, is an undue restraint of trade? It is manifest that this, the prin-

cipal question in the case, is of great public importance.

(2) The second question is jurisdictional. In a conspiracy case, where jurisdiction is obtained by the recital of overt acts in the indictment, and the defendants at the trial by evidence which they adduce admit the commission of such acts, must the trial court nevertheless charge the jury on that subject?

(3) There are two minor questions involved—(*a*) can witnesses, called on behalf of defendants charged with a violation of the Sherman Antitrust Act, give opinion evidence as to whether the industry was conducted on a competitive basis, and (*b*) was it proper for the Government to inquire into the possible bias of the witness Bantje and the activities of Hanley, the secretary of the jobbers' association?

THE FACTS

The Government at the trial adduced evidence to show (1) that the members of the combination who controlled eighty-two per cent of the sanitary pottery industry in the United States had agreed upon the selling prices for each and every article which they manufactured, and that the prices were fixed to the minutest detail; that (2) in order to sustain the prices fixed by agreement, the respondents further agreed that any sanitary pottery that was discolored or for any other reason might be regarded as a "second" should not be sold in the domestic market; and that as a result of the latter agreement, the respondents limited the supply and were enabled to exact the prices fixed.

Under the second count of the indictment, the Government proved that the respondents by agreement limited their sales to jobbers only; that they further agreed to refrain from selling to any jobber who did not carry a full line of pottery in his warehouse or who sold any other commodity besides sanitary pottery, or who in addition to his jobbing business was a contracting plumber. Those who satisfied the requirements were called "legitimate jobbers"; the others were declared to be "illegitimate."

REASONS FOR GRANTING THE PETITION

The Circuit Court of Appeals held that it was for the jury, *and not for the Court, to determine whether such an agreement constituted an unreasonable or undue restraint of trade.*

The Government believes that it would invoke an immaterial yet extremely speculative element in Sherman Act cases if the reasonableness of the scheme or the benefits to be derived are to be marshaled by a jury in determining its verdict.

The Government under this decision may be placed in the position where it will be constrained to prove excessive prices charged by the respondents, unreasonable profits made by the respondents, and all such similar facts that might appeal to a petty jury as being injurious to the general public.

If the writ of certiorari is not granted, the Government may for a long time be in a position where results in criminal cases brought under the Sherman Law would be dependent on the economic views,

prejudices, speculations, and idiosyncrasies of the various petty juries as to whether a price-fixing agreement entered into by a combination controlling a substantial part of an industry should be deemed to be a reasonable restraint of trade. Unless immediately reviewed, the decision of the Circuit Court of Appeals will thus add to the uncertainty which already exists regarding the application of the Sherman Act.

In the instant case, the failure of this Court to review the legal questions would probably result in a miscarriage of justice; for, on a retrial of the case, the trial judge would necessarily be bound by the erroneous conclusions of the Circuit Court of Appeals, and, in the event of an acquittal, the Government would be without power to correct such a misinterpretation of the statute.

If, on the other hand, the jury should, under the law as thus interpreted, find the defendants guilty, they would be powerless to correct a misinterpretation of the statute for which they were responsible. In neither event would the error of the Circuit Court of Appeals be susceptible of correction by this Court and it would therefore be—at least in the Second Circuit—the law in other cases; and thus the administration of an important statute would be subverted by submitting to the caprice of a jury questions that are essentially legal in character.

Such a construction of the law, which makes a jury and not the Court the final judge as to the prohi-

bitions of the Sherman Anti-trust Law, is in fatal conflict with the law as interpreted in other Circuits from the first enactment of the statute.

We submit that this Court should review the question on certiorari, and thus re-establish the true principle of law, and, at the same time, prevent a miscarriage on a second trial of this case.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

AUGUST, 1924.

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In the Supreme Court of the United States.

OCTOBER TERM, 1924

THE UNITED STATES OF AMERICA, petitioner,
v.
THE TRENTON POTTERIES CO. ET AL. } No. 591

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The petition in the instant case was filed by the Government on August 15, 1924.

The Government respectfully indicates that in a somewhat similar case, *United States* v. *Gulf Refining Co.*, 262 U. S. 738, a prosecution for a violation of the Elkins Act, this Court granted a writ of certiorari which is now pending.

The record in this case, filed with the Clerk of the Supreme Court, consists of five volumes. The questions raised, however, by the Government's petition, are chiefly questions of law, and this Court will find that it will have to make but few references to the record. The record, therefore, is not as formidable as it looks. The last four volumes chiefly contain price sheets and lists with which this Court will not be concerned.

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ARGUMENT

I

A PRICE-FIXING AGREEMENT ENTERED INTO BY A COMBINATION ENGAGED IN INTERSTATE COMMERCE AND IN CONTROL OF A SUBSTANTIAL PART OF AN INDUSTRY IS ILLEGAL PER SE AND CONSTITUTES AN UNDUE AND UNREASONABLE RESTRAINT UPON INTERSTATE COMMERCE. THE SHERMAN ACT DOES NOT MAKE LIABILITY DEPENDENT UPON THE ECONOMIC VIEWS OF THE JURY AS TO WHETHER SUCH AN AGREEMENT CONSTITUTES AN UNREASONABLE AND UNDUE RESTRAINT ON INTERSTATE TRADE. NOR IS THE JURY CONCERNED WITH WHETHER OR NOT SUCH AN AGREEMENT IS BENEFICIAL TO THE GENERAL PUBLIC.

The trial court held that a price-fixing agreement consummated by a combination of manufacturers controlling more than four-fifths of an industry and engaged in interstate commerce is obnoxious to the Sherman Law, because it vests the combination with arbitrariness of control.

The respondents, on the other hand, contended that price fixing by such a group is of itself not illegal; that there still remained the question of fact for the jury to decide whether price fixing on the part of the combination in this particular industry unreasonably restrained trade and commerce, *and that such determination by the jury would be dependent on proof that the prices charged were unreasonable.*

The Circuit Court of Appeals adopted the respondents' view of the law. It held that even though the jury found that a price-fixing agreement was entered into by the respondents, there, nevertheless, under the *Standard Oil* and *Tobacco cases*

(221 U. S. 1 & 106, respectively), remained the question of fact for the jury to determine whether that constituted a reasonable restraint.

The Government takes the position that a price-fixing agreement entered into by a group of manufacturers who control a substantial part of the industry and who are engaged in interstate commerce is *ipso facto* an undue and unreasonable restraint of interstate commerce and that such an agreement can not be deemed to be a reasonable restraint of trade within the meaning that that language was used by this Court.

The Federal courts have held that price-fixing agreements in their myriad forms are illegal. The law visits its condemnation on the power which such agreements give to the conspirators regardless of whether the power is exercised to enhance prices. (*American Column & Lumber Co.* v. *United States*, 257 U. S. 377, 395, 396, 398; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 323; *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 293, affirmed 175 U. S. 211; *Jayne* v. *Loder*, 149 Fed. 21.)

The Circuit Court of Appeals also held that the agreement nevertheless may be reasonable within the contemplation of law unless the jury found that the public was injured by such agreement. The Government, on the other hand, maintains that the Sherman Law embodies the presumption that whenever an unreasonable restraint of trade is effected the public is necessarily injured. The Government

further maintains that a price-fixing agreement as to every article of manufacture entered into by a group controlling more than four-fifths of an industry and engaged in interstate commerce effects an undue and unreasonable restraint of trade and that mitigating facts and circumstances can not possibly make such a conspiracy reasonable within the contemplation of the Sherman Act. (*Eastern States Lumber Association* v. *United States*, 234 U. S. 600; *Thomsen* v. *Cayser*, 243 U. S. 66, 84; *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115, 119.)

The respondents, in the brief which they submitted to the Circuit Court of Appeals, relied on those decisions of the lower courts which held the Lever Act to be constitutional. (*C. A. Weed & Co.* v. *Lockwood*, 264 Fed. 453 and 266 Fed. 785.) The Circuit Court of Appeals apparently accepted the reasoning of those decisions—that it is for the jury to determine in each case whether the fixing of prices unreasonably restrained trade and commerce in the particular industry.

According to the Circuit Court of Appeals, therefore, the elementary rule in criminal law that a criminal statute must afford a fixed standard of right and wrong and that criminal liability can not be made dependent upon the variant views of different jurors no longer stands. The Government thought that that point had been definitely settled by the decisions of this Court in the Lever Act cases. (*United States* v. *Cohen Grocery Co.*, 255 U. S. 81.)

The opinion of the Circuit Court of Appeals is in effect a repudiation of the decision of this Court in the case of the *International Harvester Co.* v. *Kentucky*, 234 U. S. 216. This Court indirectly decided the very question presented in the instant case; it declared that a Kentucky statute that made men guess on peril of indictment, whether the activity of their combination enhanced the price, is unconstitutional and that *Nash* v. *United States*, 229 U. S. 373, lent no authority for the enactment of such a statute.

If liability under the Sherman Law is dependent upon the economic views of the various juries, then the decisions of this Court and the lower Federal courts cease to be an aid in determining what is legal and what is in contravention of the Sherman Act. Under a charge in accordance with the views of the Circuit Court of Appeals, the various juries sitting in anti-trust cases of necessity would be constrained to invoke their economic views and determine whether price fixing by a combination controlling a substantial part of an industry and engaged in interstate commerce, should be deemed to be a reasonable restraint of trade.

The Government can imagine no rule of law that would make liability in a criminal case more speculative. The decision of the Circuit Court of Appeals vests the jury with a *force majeur* to override the decisions of this Court. The Circuit Court of Appeals has substituted the variant views of a petit

jury regarding public injury, in place of the act of conspiring to restrain interstate trade, as the essence of the offending.

II

THE RESPONDENTS IN EFFECT ADMITTED AT THE TRIAL THAT THEY COMMITTED OVERT ACTS IN THE SOUTHERN DISTRICT OF NEW YORK. IT WAS THEREFORE UNNECESSARY FOR THE TRIAL COURT TO CHARGE THE JURY ON THAT SUBJECT

The Circuit Court of Appeals held that since the Government obtained jurisdiction in the Southern District of New York by the allegation of overt acts, it was necessary for the Court to charge the jury on that subject. There can be no doubt that ordinarily that rule of law applies.

But in the instant case the officers of the respondent corporations called as witnesses by the Government testified to the commission of overt acts in the Southern District of New York. *Witnesses called by the respondents testified to the same fact.* That aspect of the case never led to an objection or an exception. Though the respondents submitted about sixty proposed charges to the Court covering every aspect of the case, not one of them bore on this subject. Nor did the respondents at the close of the Judge's charge request any instruction concerning this matter.

The respondents did not allege as error before the Circuit Court of Appeals the failure of the trial court to charge on the subject. They merely mentioned it in the closing paragraph of their brief. The reason for this is obvious. As to every error that they did allege, they set forth the page and

folio of their objection and exception. As to every proposed charge which was denied, they set forth the page and folio of the proposed charge. But as to this subject they could not allege that as error since it had never been a subject of disagreement at the trial; they could not possibly refer to the record.

When the trial court charged the jury that the Sherman Act condemns the act of conspiring regardless of whether anything is thereafter done to carry out the agreement, the respondents objected and asked that the converse be charged. The respondents at the argument before the Circuit Court of Appeals extracted that fact from the record, and with that as a basis for the first time maintained that by entering the objection just referred to they in effect had requested a charge on venue. The argument, however, is completely fantastic.

If, under the facts set forth, the jury should have been charged on the subject of venue, then a mere charge that it is imperative that the jury should find that the agreement was carried out would not satisfy a charge on venue. The agreement might have been carried out in the other forty-seven states and not in the State of New York; it might have been carried out in the other forty-seven states and even in every part of the State of New York except in the Southern District.

The Government therefore submits that if it was imperative for the trial court, in view of all the facts set forth, to charge the jury on the subject of venue,

then the converse of the charge given could not be substituted for a charge on the subject of venue.

The Government deems it to be obvious that the argument made by the respondents at the hearing before the Circuit Court of Appeals is without any merit whatever; *that the Circuit Court of Appeals accepted with great seriousness a lawyer argument spun by an afterthought;* and that since the respondents, by evidence which they adduced at the trial, admitted the commission of overt acts in the Southern District of New York, it was absolutely unnecessary for the trial court to charge as to fact which the respondents at the trial admitted.

III

THE COURT EXCLUDED NO COMPETENT EVIDENCE ON THE SUBJECT OF COMPETITION. NO ERROR WAS COMMITTED IN EXCLUDING QUESTIONS CALLING FOR VAGUE, INDEFINITE, AND UNCERTAIN CONCLUSIONS ON MATTERS WHICH WERE NOT THE SUBJECT OF OPINION EVIDENCE

To demolish the weight of the evidence adduced by the Government, the respondents submitted records and testimony of their witnesses to prove that their prices varied.

No objection was interposed by the Government to the introduction of these exhibits or to this testimony. Thereafter the respondents sought to propound questions of the following nature to their various witnesses:

> Can you state whether or not you found yourself in competition with other members of the association at any time?

The Government respectfully submits that uniformity of price is not to be gathered from testimony of witnesses called on behalf of the respondents as to whether they believe that competition existed in this industry.

Before any conclusion fair to either side can be drawn there should be put into evidence facts, and only facts, from which conclusions regarding competition can be made by the jury—not the opinions of the respondents, nor the opinions of jobbers, nor the opinions of the Government witnesses, nor the opinions of the man on the street as to whether or not he believes this to be a competitive industry.

There are numerous decisions of the courts which lay down the rule that a witness can not give opinion evidence on the very points submitted for decision when it is possible to submit facts from which the jury can infer the ultimate fact. *Safety Car Heating & Lighting Co.* v. *Gould Coupler Company*, 239 Fed. 861, 865; *Fred J. Kiesel & Co.* v. *Sun Insurance Office of London*, 88 Fed. 243, 249; *Patten* v. *United States*, 15 (U. S.) Court of Claims 288, 290; *Crane Co.* v. *Columbus Construction Company*, 73 Fed. 984, 989; *Stillwater Turnpike* v. *Coover*, 26 Ohio State 520; *Stirling* v. *Wagner*, 4 Wyo. 5, 42; *M. S. Huey Co.* v. *Rothfeld*, 84 N. Y. Sup. 883.

There is no question in the instant case that the respondents by their witnesses could give instances of purchases made at less than bulletin prices, or that the respondents could have an accountant

examine the records of the company and testify to his findings, or that the respondents had the right to have tabulations prepared to show the percentage of purchases made at nonbulletin prices. The trial court at no time held that the respondents could not by any method of direction or indirection prove that the agreements charged in the indictment were not made.

Objection arose when in addition to all this evidence that the respondents did introduce, they sought to have their witnesses arrogate to themselves the right to determine and declare that this was a competitive industry.

The Circuit Court of Appeals upheld the position taken by the respondents.

The Government, on the other hand, maintains that the trial court committed no error when it held that that question came within the province of the jury, and witnesses could not give opinion evidence regarding the most important and ultimate conclusion of fact.

IV

THE ACTIVITIES OF HANLEY AND THE BIAS OF THE WITNESS BANTJE WERE PROPER SUBJECTS OF INQUIRY. NEITHER THE QUESTIONS NOR THE ANSWERS WERE PREJUDICIAL: THE INCIDENTS WERE NEGLIGIBLE

The special counsel appointed by the Government to investigate the various building combines during the period of the housing shortage found that one Hanley, Secretary of the Eastern Supply Association, was the moving spirit of every combination that they investigated. Whether they examined

the soil pipe industry, the glass industry, the terra-cotta industry, or the sanitary potters' industry, which is the instant case, they found that these various associations would turn to Hanley as their guide.

The Court will recall that in the statement of facts contained in the Petition, the Government asserted that the respondents had agreed that any seconds, that is Class B goods, were to be sold for export only, in order that the prices for Class A goods could be sustained in the domestic market.

In the minutes of the Potters' Association it appears that Hanley sent a letter to the Association to this effect:

> Letter was read from Secretary Hanley of the Greater New York Association of Jobbers, protesting against the sale of Class B ware in New York, and promising their early support of any plan to stop it.

Various letters were also found in the files of the respondent corporations as to inquiries made of Hanley, regarding the subjects which formed the basis for the indictment. Both the portion of the minutes of the Association here referred to and these letters were put into evidence by the Government.

The respondents to disprove the making of such an agreement showed that at a roll call of the Association during the early part of 1921, twenty (20) of the twenty-four (24) respondent corporations reported that they were selling Class B goods in the domestic market.

The Government takes the position that it was thereupon proper for it to adduce proof that the reason why the respondents sold Class B goods in the domestic market in the early part of 1920 was that Hanley just prior to that time was under investigation by the Lockwood Committee, which was the Legislative Committee of the State of New York investigating the housing shortage in the Greater City. In other words, the Government could show that the reason why Class B goods were at that time sold in the domestic market was because Hanley had just been investigated, and that therefore proof that twenty (20) of the twenty-four (24) corporations were selling Class B goods in the domestic market in the early part of 1920 did not avoid the proof adduced by the Government that such an agreement had been made.

The Government submits that the Circuit Court of Appeals therefore erroneously regarded the questions concerning Hanley's investigation to be analogous to questioning a witness as to whether or not he was a friend or an acquaintance of a person who had been indicted or investigated.

In regard to the question propounded to Bantje, which the Circuit Court of Appeals also regarded to be improper, the Government maintains that it is always proper to question a witness as to subjects which may indicate his bias and which at the same time will not either disgrace him or degrade him in the eyes of the jury. Wigmore on Evidence (Ed. 1923), Vol. 2, p. 376 and p. 984.

The witness Bantje was a salaried employee in charge of sales of the Mott Iron Works. The Mott Iron Works was a party defendant and pleaded guilty in the first case which the counsel for the Government in the building investigation had prosecuted. It was proper for the Government to indicate that fact, not as a means to impeach the witness's credibility but in order to show his possible bias against the Government. The Government does not see how disgrace could possibly attend the witness because of the facts here set forth.

JAMES M. BECK,
Solicitor General.

NATHAN PROBST, JR.,
Special Assistant to the Attorney General.

SEPTEMBER, 1924.

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 27

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE TRENTON POTTERIES COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

PREVIOUS OPINION IN THE PRESENT CASE

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 300 Fed. 550, and appears also at R. 3699–3704.

JURISDICTION

The judgment of the Circuit Court of Appeals to be reviewed was entered May 16, 1924. (R. 3704.) Petition for writ of certiorari was filed August 15, 1924, and granted October 20, 1924, pursuant to Section 240 of the Judicial Code, then in force. (Act of March 3, 1911, c. 231, 36 Stat. 1157.)

STATEMENT OF THE CASE

The respondents (hereinafter called defendants) were indicted (R. 4) in the Southern District of New York for violating the Sherman Antitrust Law (Act of July 2, 1890, c. 647, 26 Stat. 209). The jury returned a verdict of guilty as to twenty individuals and twenty-three corporations. (R. 729.)

Defendants obtained a writ of error from the Circuit Court of Appeals for the Second Circuit (R. 3614), which court in a written opinion dated May 9, 1924 (R. 3699-3704), reversed the judgment of the District Court.

The Circuit Court of Appeals charged five errors in the conduct of the cause below:

> 1. That the question whether there was an undue and unreasonable restraint of trade should have been submitted to the jury; this it characterized as "the main point."
>
> 2. That the charge to the jury that the unlawful agreement constitutes the offense under the Sherman Act empowered the jury to convict without finding venue.
>
> 3. That three errors, which the court characterized as "minor points," were committed in the admission or exclusion of evidence.

The indictment

The indictment was in two counts. The first count charged the defendants with a combination to restrain trade by a plan to fix and maintain uni-

form prices for the sale and delivery of sanitary pottery in interstate commerce. (R. 4–11.)

The second count charged a combination to restrain trade by confining sales of sanitary pottery to a special group known to defendants as "legitimate jobbers." (R. 11–15.)

The facts

Sanitary pottery consists of vitreous chinaware fixtures used in bathrooms, including wash bowls, reverse trap bowls, syphon jet closets, tanks of various sizes and many parts connected therewith. (R. 742, 880.)

The defendants were members of a trade association known as the Sanitary Potters' Association (R. 21), and manufactured 82% of the sanitary earthenware produced in the United States (R. 746).

Twenty-three corporations and 24 individuals were indicted. The indictment was severed as to one individual defendant, and a verdict of not guilty was directed as to three of the individual defendants. All the other defendants were convicted on both counts. (R. 729.)

Of the 23 defendant corporations, 12 had their factories and chief places of business in the State of New Jersey. One was located in the State of California, and the other 10 were situated in Illinois, Michigan, West Virginia, Indiana, Ohio, and Pennsylvania. (R. 5.)

Many of them sold and delivered sanitary pottery within the Southern District of New York and some of them maintained sales offices and sales agents within that territory, from which and through which they solicited, sold, and delivered their respective products to customers in that territory. (R. 24, 47, 201, 203, 204, 211, 224, 229, 230, 246, 249, 250, 272.)

The agreed price bulletins and lists which were the basis of the alleged price agreement were issued and circulated within the Southern District of New York, and defendants solicited and made sales at those bulletin prices and obtained such prices so far as possible. (R. 392, 393, 397, 439, 441, 447, 450, 464, 466, 516, 524.) Such prices were obtained in a large majority of cases. (R. 629–630.)

Meetings of the Association were held from time to time, most of them at Pittsburgh. (R. 22.) These meetings were called as needed, about once a month, and were attended by the members (R. 1120), and by the Secretary. (R. 22.)

A Price List Committee was appointed whose duty it was to compile a basic price list and to report the same to the meeting for the approval of the members. (R. 41.) One such list was adopted in March, 1917 (R. 40–41, 753–764), and another in May, 1919 (R. 42, 765–777), the latter remaining in force up to the time of trial (R. 393).

The price charged to the purchaser would be found by deducting a bulletin discount from this

basic price. It appeared from the evidence that the percentage of uniformity between the bulletins of all the members of the Association was 80.58 in 1918, 84.25 in 1919, 87.55 in 1920, 70.05 in 1921, and 84.61 in the first six months of 1922. (R. 318.)

It appeared, for example, that at the close of the war President A. M. Maddock, of the Association, called a meeting at Pittsburgh, to which he presented a list of "present prices" and "proposed prices." (R. 1617, 880, 94–95, 382.) Prices and the discount were discussed at that meeting. (R. 476, 480, 487, 179–180.) At the next succeeding meeting, on February 4, 1919, a revision committee was appointed, which adopted substantially the list prices as proposed by Maddock (R. 749, 765–778), and its recommendation was approved by the Association at the May meeting (R. 751).

Members reported to the Secretary of the Association the number of each type of article sold during a given period and the average price. (R. 24–25.) The Secretary made use of these reports to ascertain whether the members were adhering to "regulation prices" (R. 866) and maintaining the "selling price the same as agreed" (R. 914). The Secretary could make responses to complainants who would from time to time protest against a lagging member who had not kept up the price, or would answer inquiries as to the prices or terms agreed upon. Many examples of such letters are set forth in Volume II of the Record. In one case,

for example, the Secretary was able to congratulate a member that another had "seen the light" and had "now come up to very nearly reasonable figures." (R. 1164.)

Credit terms were affixed to the basic price list (R. 766) as 2 per cent ten days, net 30 days. These appear uniformly in the bulletins between 1918 and 1922. (R. Vol. III, and Vol. V, pp. 2592–2970.)

Uniform crating charges appear in the Standard Price List (R. 777) and are referred to in the correspondence (R. 894–897). Similarly, uniform extra charges for special work were fixed and maintained. (R. 867, 940–943.)

The agreement as to "class B" goods was to confine them to export, with the obvious result of simplifying the maintenance of prices and terms in the domestic market in first-class products. (R. 880, 787–794.) A uniform export price was later fixed at two-thirds of the domestic price of "class A" goods (R. 787), and defendants were further advised upon the question by the Secretary (R. 933–934). Unfortunately, one nonmember continued to solicit "class B" domestic business, and in the words of the Secretary, "inasmuch as they are not members of the Association, we could do nothing to stop this practice." (R. 793.)

The Secretary maintained a list of legitimate jobbers to whom members might properly sell (R. 59), and conducted an active correspondence with outsiders and members as to whether a pro-

spective purchaser were legitimate or not (R. 813, 818–821, 832, 1069, 1605–1610).

The defense

The defense was directed to proving that defendants did not adhere to the uniform prices and terms agreed upon, but that competition between them continued to exist in fact.

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred in holding that the District Court should have submitted to the jury the question whether an agreement among concerns representing in excess of 80 per cent of the business to make and maintain uniform sales prices, constituted a reasonable or unreasonable restraint of trade.

2. The court below erred in holding under all the facts and circumstances disclosed by this Record, where no specific objection and exception was properly noted before the District Court by the defendants, that the District Court committed error in not charging directly on the question of venue.

3. The court below erred in holding that these defendants were in any degree prejudiced by the action of the District Court in allowing the prosecuting attorney to ask the witness Bantje whether he knew that the corporation by which he was employed had plead guilty to a violation of the

Sherman Act, particularly where the witness's answer was that he had no such knowledge.[1]

4. That the court below erred in holding that the District Court committed prejudicial error in permitting the secretary of the defendants' association to be asked with reference to his knowledge of the fact that the secretary of a jobbers' association, who had offered to cooperate with these defendants, had been called before the Lockwood Committee.

5. The court below erred in holding that the District Court committed error in excluding certain questions calling for the impressions, beliefs, and recollection of witnesses as to competitive conditions existing beween these defendants in the sale of their respective product, where either no recollection or only trifling recollection was had of specific transactions (although such information was available for reference).

SUMMARY OF ARGUMENT

I. The trial court committed no error in declining to charge generally that only undue and unreasonable restraints of trade are unlawful. It was

[1] The alleged points of error covered by 3, 4, and 5 are characterized in the opinion of the court below (R. 3702) in the following language:

"We note some minor points, as there may be a new trial."

It is apparent that the Circuit Court of Appeals would not have reversed the judgment in this case solely on these last three points.

correct to charge that a combination among those who control a substantial part of the interstate commerce in a commodity to fix the price of that commodity is an unlawful restraint of trade. Such a restraint is *per se* an undue restraint under the decisions of this court, both before and after the *Standard Oil* and *Tobacco cases*. The *Standard Oil* and *Tobacco cases* do not conflict with that proposition of law. The intent of Congress was to establish it. Whether such a price-fixing agreement is an undue and unreasonable restraint of trade is, therefore, not a jury question, and whether the prices fixed are fair and reasonable is not relevant.

II. The trial court charged that the combination and conspiracy, without proof of overt acts, constitutes the offense under the Antitrust Act. Defendants in error took no objection, exception, or assignment of error to this charge on the ground that it failed to charge the jury on the necessity of finding venue. Both sides had introduced evidence of acts in the Southern District of New York in furtherance of the conspiracy, and their existence was undisputed. It was not error to charge the jury that it did not need to find what was undisputed. *A fortiori* is this the case where the trial court's attention was not called to the oversight.

III. Defendants' witness Bantje testified to their business with the corporation of which he was a manager. He was asked on cross-examination

whether he knew that his corporation had pleaded guilty to a violation of the Antitrust Act, and answered in the negative. Assuming *arguendo* that prejudicial error might have been caused, it was cured by his negative answer. But no error was caused, for the question was properly directed to the bias of the witness.

IV. On the cross-examination of the Association Secretary, the defendants brought out that at one time 20 out of 24 members were selling "class B" goods. The question asked by the United States Attorney on redirect examination as to whether the Secretary of the Jobbers' Association was not at that time testifying before the Lockwood Committee was pertinent to an explanation of why defendants were not at that time carrying out their alleged agreement to exclude "class B" material from the domestic market.

V. Defendants objected to the exclusion of statements by various witnesses of their impressions, beliefs, and recollections of competitive conditions. Broadly, two classes of questions were excluded. Those asking whether the witness found or observed competition were too broad and called for conclusions. Those asking for recollections as to past transactions in the purchase of pottery were too vague and gave no basis for cross-examination. Wherever the witness could testify as to the details of transactions showing competitive prices, such testimony was invariably admitted, with no effort

on the part of the Government to prevent its admission. The substance of the defense of existence of competition was thereby presented to the jury.

The instances of exclusion are set forth in an Appendix, and show that there was no exclusion of this general line of testimony as to competitive conditions, but only the enforcement of a rule of evidence as to the manner of introducing it, which under circumstances here disclosed was not unjust or prejudicial to these defendants, first, because better evidence was available and denied to the jury, and second, because all the underlying facts within the knowledge of the witnesses were introduced to the jury.

ARGUMENT

I

THE DISTRICT COURT WAS RIGHT IN REFUSING TO CHARGE THE JURY THAT IF THE EVIDENCE SHOWED A PRICE AGREEMENT AMONG THOSE DEFENDANTS REPRESENTING A SUBSTANTIAL PART OF THE TRADE INVOLVED, THEY MUST THEN CONSIDER WHETHER SUCH PRICE AGREEMENT WAS AN UNDUE AND UNREASONABLE RESTRAINT OF TRADE

The Circuit Court of Appeals summarizes the situation as follows:

> The matter was finally presented by the following request to charge:
>
> "The essence of the law is injury to the public; it is not every restraint of competition and not every restraint of trade that works an injury to the public; it is only an

> undue and unreasonable restraint of trade that has such an effect and is deemed to be unlawful."
>
> Which request was refused *in toto*. In this we think the learned court erred, and in a manner that went to the foundation of the prosecution. (R. 3701, 300 Fed. 553.)

The Government concedes the correctness of the requested charge as a proposition of law. It does not follow, however, that the District Court committed error in declining to give it. A trial court is not expected to expound to the jury the general principles of law governing a case, when courts have further defined the meaning of those general principles as applied to facts similar to those in the case on trial.

A rule of law that would require a trial court to charge the jury upon the interpretations already given to a statute by the courts, as suggested by the Circuit Court of Appeals, would in Antitrust cases lead to the absurdity of reading and expounding to a jury a course of decisions which have been gathered in more than nine full volumes of printed reports. The court here followed the proper procedure of instructing the jury as to the law applicable to the facts of the case on trial (R. 697):

> Let me advise you, so that there can not be any possible misunderstanding in your minds that it is illegal and a violation of the Sherman law for a group of independent units—that is, individuals or corporations—operating in combination, such as a trade

> association of the character shown here, to agree amongst themselves to fix the prices to be charged for the commodity which the members manufacture, where they control a substantial part of the interstate trade and commerce in that commodity.

The issue presented is whether an agreement to fix prices among those controlling a substantial proportion of an industry is *per se* an unlawful restraint of trade or whether the Government must prove that the prices fixed were in themselves unreasonable. It is submitted that the latter view finds no support in the decisions of this court, not excepting the cases of *Standard Oil Company* v. *United States* (1911), 221 U. S. 1, and *United States* v. *American Tobacco Company* (1911), 221 U. S. 106.

The cases will be reviewed herein historically.

United States v. The Trans-Missouri Freight Association (1897), 166 U. S. 290

United States v. Joint Traffic Association (1898), 171 U. S. 505

These cases involve essentially similar states of fact and for our purposes may be considered together. They stand for the proposition that an agreement between carriers to fix rates is unlawful under the Sherman Act.

The rule established by these cases in so far as carriers are concerned has, of course, been modified by statute, but the principle that a price-fixing

agreement is unlawful where the particular type of enterprise concerned has not been excepted by statute remains as the rule to-day.

At page 310 of the opinion in the *Freight Association case* the issue is outlined by the court:

> The bill shows here an agreement entered into (as stated in the agreement itself) for the purpose of maintaining reasonable rates to be received by each company executing the agreement.

This court pointed to the impropriety of a judicial determination of the reasonableness of an agreed rate, and concluded that "there can be no doubt that its direct, immediate, and necessary effect is to put a restraint upon trade and commerce as described in the act." 166 U. S. at pp. 341, 342.

Standard Oil Company v. United States (1911) 221 U. S. 1

United States v. American Tobacco Company (1911) 221 U. S. 106

It is sometimes said that the *Freight Association* and *Joint Traffic cases* were overruled by the *Standard Oil* and *Tobacco cases.* In so far as they stood for the general proposition that no question of the reasonableness of a restraint can arise under the Sherman Act it is undoubtedly true that they were "limited and qualified" by the opinion in the *Standard Oil case* (221 U. S. at p. 67). However, reference to the opinion in the *Standard Oil case* shows

that the actual decisions of the *Trans-Missouri* and *Joint Traffic cases* were not affected.

Chief Justice White pointed out (221 U. S. at p. 65) that the "nature and character" of agreements upon fixed rates and terms create "a conclusive presumption" which brings them within the statute. Such a case is "plainly within the statute" (p. 67) so that there is a "want of power" to take it out of the statute by a resort to reason, and is to be distinguished from a case where the lawfulness of a contract depends upon a study of the reasonableness of its terms in the light of the surrounding circumstances. Again, at page 58:

> The dread of enhancement of prices and of other wrongs * * * led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, *either* from the nature or character of the contract or act *or* where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade * * *. (Italics ours.)

Under the decisions of this court an agreement among a substantial proportion of those engaged in a given line of commerce upon fixed prices to be charged in that line belongs preeminently to the category of "contracts or acts which were unreason-

ably restrictive of competitive conditions * * * from the nature or character of the contract or act."

The *American Tobacco case* contained a reaffirmation of the doctrine of the *Standard Oil case,* that acts or contracts or agreements or combinations might be adjudged by their "inherent nature," as well as by their "effect," to operate to the prejudice of the public interests by unduly obstructing competition or unduly obstructing the due course of trade. 221 U. S. at p. 179.

Under the previous decisions of the court it becomes clear that an agreement or combination to fix prices is one of those which "because of their inherent nature or effect" injuriously restrain trade. In this class of cases no question arises as to the reasonableness of the price fixed, just as in cases involving an allotment of territory or a secondary boycott no question of the reasonableness of the allotment or of the secondary boycott arises. These actions are in themselves unreasonable "because of their inherent nature." This conclusion does not in any way detract from the principle that the phrase "restraint of trade" in the Sherman Act is to be read under the light of reason. The restraint of trade under consideration must be an undue and unreasonable one, but this does not mean that the price fixed must be undue and unreasonable. The unreasonableness of the price-fixing agreement arises from the nature of the agreement

itself and of the parties thereto and not from the price fixed.

Decisions between the time of the Freight Association and Joint Traffic Cases, and of the Standard Oil and Tobacco Cases

The case of *Addyston Pipe & Steel Company* v. *United States* (1899), 175 U. S. 211, directly involved a price-fixing agreement. It was determined by the Circuit Court of Appeals (opinion by Judge, now Mr. Justice Taft) that the prices fixed were not in fact fair and reasonable, and this conclusion was confirmed by the Supreme Court. It was made clear, however, in the opinions both of Judge Taft below and of Mr. Justice Peckham in this Court that an agreement to fix prices was unlawful irrespective of the fairness or reasonableness of the prices fixed. At pages 237 and 238 of the opinion of the Supreme Court the following excerpt from the opinion of Judge Taft below is quoted with approval:

> It has been earnestly pressed upon us that the prices at which the cast-iron pipe was sold in "pay" territory was reasonable * * *. We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract.

Swift & Company v. *United States* (1905), 196 U. S. 375, was an express decision by this Court authoritative on the case at bar. This was an

appeal by the Chicago packers from a decree entered in the Circuit Court for the Northern District of Illinois. This decree provided, among other things, that the defendants should be restrained from "by combination, conspiracy, or contract raising or lowering prices or fixing uniform prices at which the said meats will be sold either directly or through their respective agents." *Decrees and Judgments in Federal Anti-Trust Cases* (Washington, 1918), 63, 64.

The terms of this decree, therefore, had no relation to the fairness of the prices which might be fixed, but forbade the fixing by agreement of any prices, whether higher, lower, or in any way uniform. The decree was carefully considered by the Supreme Court, and this provision was among those which were expressly approved by this Court.

It was determined that a "combination, conspiracy, or contract raising or lowering prices or fixing uniform prices" is a direct restraint of trade within the decisions of the court.

In the opinion of the Court in *National Cotton Oil Company* v. *Texas* (1905), 197 U. S. 115, construing the Texas Antitrust statute, there is found at page 129 the following reaffirmation of the American doctrine as to price fixing:

> The purpose (of monopoly) is so definitely the control of prices that monopoly has been defined to be "unified tactics with regard to prices." It is the power to control prices which makes the inducement of combina-

> tions and their profit. It is such power that makes it the concern of the law to prohibit or limit them. And this concern and the policy based upon it has not only expression in the Texas statutes; it has expression in the statutes of other states and in a well-known national enactment.

Dr. Miles Medical Company v. *J. D. Park & Sons Company* (1911), 220 U. S. 373, was argued the week before the reargument in the *Standard Oil* and *Tobacco cases,* and the opinion of the court was handed down at the same term. The following quotation is taken from the opinion of Mr. Justice Hughes, at page 408:

> Agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void.

Decisions subsequent to the Standard Oil and Tobacco cases

That the *Standard Oil* and *Tobacco cases* did not overrule prior cases, such as the *Freight Association, Joint Traffic,* and *Swift cases* is strongly stated in *Thomsen* v. *Cayser* (1917), 243 U. S. 66, 84:

> * * * we are brought to the consideration of the grounds upon which the Circuit Court of Appeals changed its ruling; that is, that it was constrained to do so by the *Standard Oil* and *Tobacco cases,* 221 U. S. 1, 106 * * *.

> But the cited cases did not overrule prior cases. Indeed, they declare that prior cases, aside from certain expressions in two of them, or asserted implications from them, were examples of the rule and show its thorough adequacy to prevent evasions of the policy of the law "by resort to any disguise or subterfuge of form," or the escape of its prohibitions "by any indirection."

Just as in the case at bar, the defendants in the case of *Standard Sanitary Manufacturing Company* v. *United States* (1912), 226 U. S. 20, manufactured 85% of the enameled iron ware in the United States, and entered into an agreement as to the prices to be charged for their product. To the argument (pages 25 and 26) that the decisions in the *Standard Oil* and *Tobacco cases* justified a consideration of the reasonableness of this agreement, the court responded that—

> The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts can not be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be of some good results. *United States* v. *Trans-Missouri Freight Asso.*, 166 U. S., 290; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 62.

A peculiar type of price-fixing agreement came before the Court in 1918 in *Chicago Board of Trade* v. *United States*, 246 U. S. 231. This case appears to stand for the proposition that the fixing of a

price by agreement for a limited portion of the day and upon a strictly limited type of transaction may be legal if it applies only to a small portion of the commerce in question. It is true that this Court there decided that a certain type of price-fixing by agreement might be legal. But the Court was careful to point out that, first, the restriction was limited to a certain portion of the business day; second, it was restricted in operation to only a small part of the grain shipped from day to day to that market; and third, it had no appreciable effect on the general market prices. And it further appeared that the net result of the rule was to preserve the price which had been the result of open general competition on that morning on the floor of the exchange.

This case does not in any way limit the rule that where those who control a substantial proportion of any line of commerce enter into an agreement to fix prices, such agreement is illegal because of the necessary effect which it must have.

The last occasion for this Court to refer to price-fixing agreements arose in the cases of *Maple Flooring Association* v. *United States* (1925), 268 U. S. 563, and *Cement Manufacturers Protective Association* v. *United States* (1925), 268 U. S. 588. At page 578 of the *Maple Flooring* opinion appears the following:

> It is not contended that there was the compulsion of any agreement fixing prices, restraining production or competition, or

otherwise restraining interstate commerce. (Italics ours.)

The inference is clear that an agreement to fix prices is an agreement to restrain interstate commerce. As such it is distinguished from the type of agreement under consideration in the *Maple Flooring* case—a type which must be considered in the light of all the surrounding circumstances in order to determine whether it constitutes a restraint of trade.

In the *Cement case* the view of the Court was expressed unequivocably. This case did not involve a price-fixing agreement. However, a minority of the court dissented from a decision upholding the agreements there drawn in question, on the ground that such agreements must lead by indirection to the establishment of prices by some other force than that of competition. The majority of the Court made it clear, in the opinion written by Mr. Justice Stone, that they were in agreement with the minority upon the illegality of any agreement to fix prices by combination:

> Agreements or understanding among competitors for the maintenance of uniform prices are, of course, unlawful and may be enjoined. (Opinion, page 604.)

Intent of Congress

There can be no doubt that the Senate which passed the Act of July 2, 1890, understood that they were rendering unlawful all price-fixing agree-

ments. During the debates on the original bill, an amendment was passed by a vote of 34 to 12 (Cong. Rec. Vol. 21, part 3, page 2611), which contained the following provisions (Cong. Rec. Vol. 21, part 2, page 1772):

> SEC. 2. That a trust is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or of any two or more of them for either, any, or all of the following purposes:
>
> To limit or reduce the production or to increase or reduce the price of merchandise or commodities.
>
> To fix a standard or figure whereby the price to the public shall be in any manner controlled or established of any article, commodity, merchandise, produce, or commerce intended for sale, use, or consumption.

The bill as amended was later referred back to the Judiciary Committee and reported out in essentially its present form. It may properly be assumed, therefore, that the term "restraint of trade" was understood to embrace the particular evils which had been specified in the bill as originally passed.

Legal standard applicable to the case at bar

It is suggested in the opinion of the Circuit Court of Appeals (300 Fed. 554) that under the *Nash* case (229 U. S. 373) the reasonableness or unreasonableness of every restraint of trade must be

submitted to a jury.[2] Defendants in error argued further at the bar of the Circuit Court of Appeals that the reasonableness or unreasonableness of a fixed price must be submitted to the jury. The Government view is that each of these views represents a misconception of the law as expounded by this court.

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[2] This view has apparently been since abandoned by the same circuit court of appeals. We quote from the opinion of Learned Hand, J., in *Live Poultry Dealers' Association* v. *United States* (1924), 4 F. (2d) 840, 842:

"It is somewhat surprising at this day to hear it suggested that a frank agreement to fix prices and prevent competition as regards them among one-half the buyers in a given market may be defended, on the notion that the results are economically desirable. We should have supposed that, if one thing were definitely settled, it was that the Sherman Act forbade all agreements preventing competition in price among a group of buyers, otherwise competitive, if they are numerous enough to affect the market. The suggestion is that since *Standard Oil Co.* v. *U. S.*, 221 U. S. 55, 31 S. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, such a combination may be justified, if some prejudice to the public be not shown. That might be the law, but we do not so understand it."

We do not suppose that a combination of buyers is any more unlawful than a combination of sellers. Or that the substantive law is different in an equity court than in a criminal court. Indeed, on this latter point the court in the case at bar was explicit (300 Fed. at p. 553):

* * * "The statute can not mean one thing on the criminal side of the court and another on the civil side."

Attention was called below to certain remarks by the trial judge (R. 665–666) which might be construed as evidencing an analogous misconception on his part, viz., that the doctrine of the *Standard Oil* and *Tobacco* decisions could have no application to a criminal case. In so far as his remarks were applicable to the proven facts of the case at bar, however,

The suggestion that a jury is to pass upon the reasonableness of a fixed price is untenable under the cases of *International Harvester Company* v. *Kentucky* (1914), 234 U. S. 216, and *United States* v. *Cohen Grocery Co.* (1921), 255 U. S. 81. These cases stand for the proposition that a statute is unconstitutional which submits to a jury the criminal liability of a defendant upon the issue of whether prices and terms fixed by him have been fair and reasonable. The Sherman law is outside this class of statutes. *Nash* v. *United States, supra.* Reasonableness of restraint is a different concept from reasonableness of price.

The invalidity of the Kentucky statute and the Lever Act flowed from their failure to supply a standard for the guidance of the citizen. The decisions upon restraint of trade at common law and upon the Sherman Act provide, on the other hand, adequate standards of legality. So in the *Cohen case* (at p. 92), dealing with the Lever Act, this court pointed out the distinction of the *Nash* and similar cases in that they—

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they were correct in that such facts did not present a question of reasonableness for either court or jury. They were covered by the established rule of law that a price agreement between those who control a substantial portion of the production of a commodity is an unreasonable restraint of trade.

Though a suggestion, therefore, that one rule may apply at criminal law and another in equity would be erroneous, no error can be predicated upon such a suggestion made in argument in a case like that at bar where the judge proceeded to charge the jury upon the properly applicable theory of law.

> * * * all rested upon the conclusion that, for reasons found to result either from the text of the statutes involved or the subjects with which they deal, a standard of some sort was afforded.

The standard appears in the now familiar quotation at page 376 of the opinion in the *Nash case:*

> Only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.

The request to charge which received the approval of the Circuit Court of Appeals in the case at bar was evidently founded upon this clause that—

> Only such contracts and combinations are within the act as prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade—

but in relying upon this clause defendants in error and the Circuit Court of Appeals fell into the error of overlooking the qualifying phrase—

> by reason of intent or the inherent nature of the contemplated acts.

It is this phrase which supplies the standard by which the prejudice to the public interests and the undue restraint of trade is to be measured. It is this phrase which has received definition in the cases decided by this court. They have established the doctrine of law that a price-fixing agreement

entered into by those who control a substantial proportion of a given industry is one of those contracts and combinations which are within the Act by reason of the inherent nature of the contemplated acts.

This is the clear legal standard to which citizens may refer in guiding their footsteps within the path of the law. To the jury is left the question whether such an agreement has in fact been entered into in the case on trial.

II

EVIDENCE PROBATIVE OF VENUE IN THE SOUTHERN DISTRICT OF NEW YORK HAD BEEN INTRODUCED AT THE TRIAL IN LARGE QUANTITY BY BOTH SIDES. NO PREJUDICIAL ERROR WAS CAUSED BY THE FAILURE OF THE TRIAL COURT TO CHARGE DIRECTLY ON THE QUESTION OF VENUE. NO OBJECTION WAS MADE OR EXCEPTION TAKEN AT THE TRIAL

The defendants made no point at the trial that the charge to the jury was improper in that respect. The point was presented to the Circuit Court of Appeals and only incidentally. This is shown by quotation of the point raised by them in their brief below, and by reference to that portion of the charge of the court to which they took exception, and to their exception. The quotations are taken from page 92 of the defendants' brief below:

The ground stated in defendants' brief:

> Point XII. The Court erred in charging the jury that if it found that the defendants combined and conspired to restrain trade by entering into the agreements charged in the indictment, it was immaterial whether such agreements were actually carried out or not.

The charge of the court (R. 695):

> I must, therefore, advise you that if you find the defendants combined and conspired to restrain trade by entering into the agreements charged in the indictment, then these agreements violated the Sherman Act, and it is immaterial whether such agreements were actually carried out or have accomplished their purpose in whole or in part.

Exception taken by defendants to this portion of the charge (R. 722):

> I respectfully except to that portion of your Honor's charge wherein your Honor stated that a mere agreement constitutes an offense, whether anything is done to carry it out or not, and where your Honor went on to say that it is immaterial whether agreements are carried out or not. That latter phrase, that it is immaterial whether the agreements were carried out or not, I submit is wrong——
>
> The COURT. Immaterial for the consideration of the jury.
>
> Mr. MARSHALL. That is precisely what I want to bring to your Honor's attention—that I submit they are material from the

> aspect of determining whether the agreement was made, and if the jury find they were not carried out, it may be cogent evidence in their minds that the agreement was not made.

These quotations establish beyond question that the defendants did not raise in the court below any question of venue. They argued only that the court should have charged the materiality of the carrying out of the agreements as evidence of the existence of the agreements. None of the defendants' exceptions and none of the assignments of error make any reference to a failure to prove venue in the Southern District of New York.

In fact the indictment alleged that the company was carried on in the Southern District of New York by combined action in pursuance thereof (R. 9–10, 13), and not merely the Government but the defendants produced witnesses who testified to that course of business within the jurisdiction of the court. In fact a number of the defendants themselves so testified.

Evidence that defendants circulated bulletins and made sales in pursuance of the combination in the Southern District of New York appears at the following pages of the Record:

> R. 24, 47, 48, Gov. Exh. No. 26 (Vol. 2, page 787), 199, 201, 203, 204, 206, 208, 211, 222, 223, 224, 227, 229, 230, 231, 246, 247, 249, 250, R. 262, 264, 272, 392, 398, 438, 441, 447, 463, 465, 516, 524.

By reason of their character and their relation to the agreements alleged in the indictment such acts were "overt acts" giving jurisdiction to the court, the conspiracy "carrying to the whole area of its operations the guilt of its conception and that which follows guilt, trial and punishment." *Hyde* v. *United States,* 225 U. S. 347, 363.

This was recognized by the Circuit Court of Appeals (300 Fed. at p. 552), which had itself in *Easterday* v. *McCarthy,* 256 Fed. 651, recognized the opinion of this Court as laid down in the *Hyde* case that conspiracies on a common-law footing are indictable where their operation is continued through the commission of overt acts. This Court there cited with approval (225 U. S. at p. 365) the opinion in *Robinson* v. *United States,* 172 Fed. 105, which reviewed the cases and pointed out that—

> at common law the venue in conspiracy could be laid in any county in which it could be proven that an overt act was done by any one of the conspirators in furtherance of their common design.

Again, at page 365 of the opinion in the *Hyde case,* this court quoted with approval the following quotation taken by the *Robinson case* from *People* v. *Mather,* 4 Wend. (N. Y.) 261, opinion by Marcy, J.:

> The law considers that wherever they act there they renew, or perhaps, to speak more properly, they continue their agreement, and this agreement is renewed or continued as

> to all whenever any one of them does an act in furtherance of their common design.

The reasoning, equally applicable to cases under the Sherman Act, was given by this court at page 363 of the opinion:

> We must not, in too great a solicitude for the criminal, give him a kind of immunity from punishment because of the difficulty in convicting him—indeed, of even detecting him. And this may result if the rule contended for be adopted. Let him meet with his fellows in secret and he will try to do so; let the place be concealed, as it can be, and he and they may execute their crime in every State in the Union and defeat punishment in all.

The Circuit Court of Appeals confined itself therefore to the criticism that the trial judge had not charged the jury that the commission of an overt act in the Southern District of New York must be proven. It said in this connection:

> We are persuaded that both the prosecution and the learned court overlooked the peculiarities of this case.

Indeed, it is not surprising that the defendants themselves overlooked the alleged jurisdictional error, after the introduction by both sides of so much evidence in agreement upon the commission of overt acts in the Southern District of New York. There was no question or conflict on this point for the jury to resolve, but it was through the introduction of evidence as effectually admitted by the

defendants as if they had entered into a stipulation. The only issue left to the jury was whether these acts had been done in pursuance of a prior combination and conspiracy.

To reverse on such a ground the conclusion of a trial lasting over four and one-half weeks is to follow the shadow of things and to disregard their substance. Certainly there was here no error prejudicial to the rights of the defendants.

To summarize, error is predicated upon a failure to charge that the conspiracy was carried out in part within the Southern District of New York. In their exception, the defendants objected to the charge solely on the ground that proof of overt acts in pursuance of the conspiracy might be material in determining whether the conspiracy was entered into. (R. 722 and 723.) There is no connection or relation whatsoever between these two concepts.

The situation here presented is that at the time of trial the defendants objected to the charge of the trial judge upon one ground, while now they seek to object to that charge on another ground which was not called to the attention of the trial court in any form at the time of trial.

The applicable rule of law is found in the dissenting opinion of Mr. Justice Pitney in the case of *Frey & Son, Inc.*, v. *Cudahy Packing Company*, 256 U. S. 208, 214:[3]

[3] The opinion of the majority of the court in the cited case in no way affects the applicability of Mr. Justice Pitney's opinion to the case at bar.

There is nothing here to show that the attention of the trial judge either was or ought to have been directed to that part of his charge now held to be erroneous. The exception alleged did not even faintly or approximately express the tenor and effect of that instruction or of any other that was given to the jury; much less did it fairly and distinctly raise a question of law upon this or any other point in the charge.

It is elementary that, in order to lay foundation to review by writ of error the proceedings of the courts of the United States in the trial of common-law actions, the questions of law proposed to be reviewed must be raised by specific, precise, direct, and unambiguous objections, so taken as clearly to afford to the trial judge an opportunity for revising his rulings; and that a bill of exceptions not fulfilling this test will furnish no support for an assignment of error.

III

THE DEFENDANTS WERE NOT PREJUDICED BY THE ACTION OF THE DISTRICT COURT IN ALLOWING THE UNITED STATES ATTORNEY TO CROSS-EXAMINE A WITNESS AS TO BIAS BY ASKING HIM WHETHER HE KNEW THAT HIS OWN CORPORATION HAD PLEADED GUILTY TO A VIOLATION OF THE SHERMAN ACT

Defendants' witness, Bantje, was manager of the earthenware department of the J. L. Mott Iron Works. (R. 451–453.) His testimony was cumulative of that of other defendants' witnesses, and was intended to show that he had bought from the

defendants at varying prices and prices below the arbitrary bulletin prices. On cross-examination he was asked whether he knew that his own corporation, the J. L. Mott Iron Works, had pleaded guilty to a violation of the Sherman Act, and answered "No." (R. 453–457.)

(*a*) *Any danger of prejudice was removed by the answer of the witness*

Assuming *arguendo* that the defendants might have been unfairly prejudiced by a showing that one of their witnesses knew that his employer had pleaded guilty to a violation of the Sherman Act, the danger was removed by the answer that witness did *not* know it.

Merely to ask the question surely is not such prejudicial error as to justify the reversal of a conviction reached after a month's trial.

The Government submits, moreover, that the question was competent.

(*b*) *The question was competent*

The question was directed to the bias of the witness. That he was associated in an important capacity with a corporation in the same line of business as the defendants and which had itself violated the same law would tend to show his *animus* in the case against the prosecution. In modern practice the admissibility of such questions is habitually a problem for the exercise of discre-

tion by the trial court. *Wigmore on Evidence* (2d ed.), Vol. II, sec. 949.

Suppose an analogous case. If a witness for the defense in a counterfeiting case should testify that he had handled the plates with the defendant and that they were not used for counterfeiting, the prosecution would surely be justified in showing his bias by asking him whether he had not been himself manager of a corporation whose officers had just pleaded guilty to a charge of counterfeiting.

Not only was there strong reason in the instant case to support the theory of bias, but that theory finds support in the ancient doctrines of the common law as to witnesses with an interest. This witness had run the risk of pecuniary loss, his employment had been put in jeopardy by the danger which his employer had been in through the violation of the very law under which this prosecution was being conducted.

The Circuit Court of Appeals stated:

> We are not aware of any other ruling heretofore made which in effect impugns the veracity of a whole body of employees, because the corporate employer had previously pleaded guilty to an infringement of the Sherman law.

The learned court overlooked the fact that in the case of a loyal employee a bias very naturally arises in just such a situation. And the government did not impugn the veracity of the "whole body of em-

ployees," but only of that employee (a manager) who had been chosen by the defendants to speak on their behalf for the corporation in question.

IV

NO PREJUDICIAL ERROR WAS COMMITTED BY THE DISTRICT COURT IN PERMITTING THE SECRETARY OF THE ASSOCIATION BEING CONDUCTED BY THE DEFENDANTS TO BE ASKED WHETHER HE KNEW THAT THE SECRETARY OF ANOTHER ASSOCIATION, WHO IS SHOWN BY THE RECORD TO HAVE BEEN COOPERATING WITH THESE DEFENDANTS IN BRINGING ABOUT RESTRAINTS OF TRADE IN THE SALE OF POTTERY, HAD BEEN CALLED TO TESTIFY BEFORE THE SO-CALLED LOCKWOOD COMMITTEE

The Government was seeking to prove that the purpose of the defendants was not to sell "seconds" or class "B" pottery in the domestic markets as an aid to their price agreement. To that end it sought to prove that Dyer, secretary of the defendants' Association, their employee and co-conspirator, had had correspondence with one Hanley, secretary of an association of jobbers of pottery, who were the vendees of these defendants or some of them.

In offering evidence on that point the Government examined Dyer as to a letter passing between himself and Hanley, in which Hanley offered his and his Association's cooperation to bring about the exclusion of class B pottery. (R. 1077, 191.) Other evidence offered by the Government indi-

cated that the defendants' Association had formed a purpose to exclude class B pottery. (R. 787–794, 880–881, 907, 933–934.)

Attention had been invited on cross-examination by the defense to the fact that at one time twenty out of twenty-four companies were selling class "B" pottery. (R. 165.) It therefore became highly material for the Government to show on redirect examination why only a minority of defendant companies were refraining from selling class "B" goods at that time.

It was common knowledge that the Lockwood Committee, a duly authorized committee of the New York Legislature, was conducting a general investigation into the activities of contractors and labor leaders as to restraints and extortions in the building industry, and of this the Circuit Court of Appeals took cognizance, 300 Fed. at p. 554. As a result of the public activities of this Committee, many trade associations went out of existence and many ceased illegal activities or activities of doubtful legality. The broad investigation carried on by the Lockwood Committee had, as was well known, the effect of restraining dubious and illegal practices of many associations, particularly of those associations whose officers were called before the Committee for examination.

For the purpose of showing knowledge on the part of Dyer, the Secretary and co-conspirator of the defendants, the question was asked of him whether he did not know that Hanley, who had ten-

dered his active assistance to prevent the sale of class "B" pottery, had been called before the Lockwood Committee. The purpose was to provide the jury with knowledge of surrounding conditions, so they could judge of the connection between the cessation of practices with reference to the sale of class "B" pottery by these defendants, and the fact that it was common knowledge that Hanley, who had tendered assistance in this connection, and was the secretary of the Association to which most of the buyers belonged, was already the subject of investigation by the Lockwood Committee.

The inference would be logical that the defendants had "at that time" refrained from an illegal practice because they knew that the man with whom that business was being most actively carried on was being examined by an investigating committee.

In fairness it can not be asserted that the question was for the purpose of "besmirching" the defendants. A more rational conclusion is that the jury was entitled to know these facts for the purpose of ascertaining whether or not there were at that time in existence conditions which would deter Dyer and the defendants from fully carrying out and putting into effect their purpose to restrain the sale of class "B" pottery on domestic markets. Especially is this true since the record shows that Hanley had tendered aid and assistance in bringing about such conditions.

It is submitted that no prejudicial error, and in fact no error of any kind, was committed by the

trial court in permitting the jury to see all the surrounding conditions existing at the time when certain action was taken by this Association, which it now relies upon to show the absence of any purpose to restrain trade in class "B" pottery. If that purpose had been temporarily abandoned through fear of the Lockwood Committee, the jury was entitled to know it.

V

THE DISTRICT COURT COMMITTED NO ERROR IN EXCLUDING QUESTIONS BY DEFENDANTS' COUNSEL CALLING FOR OPINIONS AND CONCLUSIONS IN REGARD TO THE EXISTENCE OF COMPETITION BETWEEN DEFENDANTS AND IN EXCLUDING THAT TYPE OF ANSWER FROM WITNESSES WHO WERE UNABLE TO TESTIFY TO FACTS

The extracts from the record, which in substance cover the specific instances of the exclusion of certain questions and answers by the trial court, to which these defendants most seriously objected below and as to which they alleged error, are found at R. 344, 397, 436, 441, 469, 512, 375, 474, 497, and 493, and are analyzed in the Appendix to this brief.

The defendants offered the testimony of witnesses who were either manufacturers of pottery or jobbers of such pottery, who purchased their supplies from these defendants or other like manufacturers, to the effect that competition existed among manufacturers, particularly these defendants, in the sale of such pottery.

Broadly stated two classes of questions, asked by counsel of such witnesses on direct examination, were objected to and excluded.

Questions of the first class were in substance whether the witness had seen or noted competition in such sales. It is apparent that questions couched in general language as to whether competition was found or observed were too broad. The answers to such questions would not necessarily be responsive in such a case as this where the sole issue was whether there had been price competition. The witness when testifying might have had some other kind of competition in mind.

The second class of questions were addressed to witnesses in such form that the answers would have embodied the impressions, beliefs, and possibly recollections of the witnesses as to past transactions in the purchase of pottery, without any or substantial details, instead of calling for exact knowledge of competitive conditions as to which testimony was desired. In many of these instances it appears in the Record that such witnesses had available business records containing exact information and details as to what did occur with reference to competitive prices made or tendered, but that no inspection of such records had been made. (R. 344, 470, 500.) On direct examination inability on the part of some of such witnesses to testify to any specific instances in support of the general impression, belief, or recollection was conceded. (R. 469–

470, 449, 453, 524.) *Wherever the witness could testify as to the details of transactions showing competitive prices, such testimony was invariably admitted, with no effort on the part of the Government to prevent its admission.* (R. 442, 513, 521, 498, 516, 525, 491, 459.)

The question of price competition was an issue of prime importance in the case. Respondents sought to have witnesses with no or slight supporting recollection of details testify as to conclusions of fact or opinions dealing with conditions material to that issue. Moreover, allowing defendants' witnesses to give their impressions, opinions or conclusions as to the existence of competition, without reference to specific transactions, would have precluded the Government from refuting the evidence either by cross-examination or on rebuttal. Consider what would have been the situation had the evidence been admitted, and had the Government, in rebuttal, called an equal number of witnesses to testify in their opinion, based on experience and observation, that there was no competition in the pottery business. Issues of fact can not fairly be determined upon the basis of such evidence.

A study of the record also reveals that there was no effort on the part of the Government, nor was there any disposition on the part of the trial court to prevent witnesses for the defendants from testifying as to *particular acts* of competition; for example, as to selling below the bulletin prices or

cutting prices to secure business. Buyers from defendants were at liberty to give testimony that they had made purchases below the bulletin price or had received different bids or quotations in their purchases of these products, where the witnesses were able to recall any specific facts which would lay a just basis for testing the truth thereof. In fact, the trial court suggested to counsel for defendants methods by which this particular line of testimony could be introduced to the benefit of these defendants. (R. 468, 469.)

The following colloquy is instructive (R. 467):

> Mr. MARSHALL (counsel for defendants). Suppose that a man does not remember all these precise details, but has a strong impression or belief or recollection about the ordinary course of events that he has gone through.
>
> Mr. PODELL (assistant United States attorney). But he has the records.
>
> The COURT. Here he must testify as to facts.

Summarizing the facts disclosed by the record with reference to the introduction of this class of evidence, it appears that about 18 witnesses testified for the defense as to alleged competitive conditions. Seven testified without substantial objection. Eleven were prevented only from testifying as to their conclusions and impressions relative to competition between these defendants either (*a*) where no underlying facts were recalled (though in most

instances such facts were available for reference), or (*b*) where only a trifling number out of a very large number of transactions were recalled. Further, all such witnesses were permitted to testify as to all specific transactions within their recollection without substantial objection.

Furthermore, examination of this record discloses (R. 529–532) that a stipulation was entered into between counsel for the purpose of diminishing this cumulative evidence, particularly from jobbers as to competitive conditions supposed to be shown by their dealings with the defendants. This stipulation covered the authenticity of certain tabulations introduced by the defendants as to the actual sales made by them based upon the transactions disclosed by their respective books. It is evident that such tabulations would disclose the prices made by the defendants in such a fashion as to enable the jury to examine into the defence of price competition offered by them. It is expressly stated in the Record (R. 530, 532) that these tabulations were introduced in lieu of the testimony of numerous jobbers intended to be called by the defense. It will be noted that this form of introducing evidence on competitive conditions is in harmony with the contentions of the Government embodied in objections made at trial, the sustaining of which is the substantial basis of defendants' assignment of error.

There can be no doubt but that the substance of the defense as to the existence of competition between these defendants was submitted to this jury without substantial or prejudicial interference from the Government by objection, or from the court by its rulings on the manner of introducing the evidence.

On four grounds then it is submitted that no error was committed in the rejection of these broad questions:

First. The questions were, for the most part, couched in such general language that the answers would not be directly and necessarily responsive to the issues involved.

Second. This opinion testimony was offered (when the fundamental facts, neither evanescent nor complex in their nature, were confessedly available) in such a form as to make it impossible for the Government to test the trust of the generalities offered in evidence, either by cross-examination of the witness at that time or by the procurement and introduction of specific evidence *aliunde* to disprove those generalities.

Third. The conclusions or inferences sought to be testified to cover the final inference as to the existence of facts in issue, or in any event of facts highly material to the issue.

Fourth. As a result of the unimpeded testimony of witnesses to known primary facts and the introductions of tabulations of actual sales from books

of defendant companies the jury had the substance of the defense attempted to be offered as to competitive conditions.

The Circuit Court of Appeals held that it was—

> rather late in the history of Sherman law litigation to treat the word "competition" as even connoting or suggesting anything not known to all men.

It is common knowledge to those who come in contact with business men and others engaged in commerce that the word "competition" finds many definitions among them. Often, where absolutely uniform prices are maintained by groups, either with or without an agreement, the statement is made that there is actual competition in the sense that the same trade is sought by more than one at the uniform price. Again among that class where uniform prices prevail a condition described as competition is found to exist where that competition is solely one of *service,* either as to promptness or satisfaction. Again, others find a condition defined as competition where rivalry as to the *quality* of the article is the only real competition that exists. And this Court is already familiar with the vagaries of what have been called "open competition" plans. *American Column & Lumber Company* v. *United States,* 257 U. S. 377; *United States* v. *American Linseed Oil Company et al.,* 262 U. S. 371.

There may be cases where by force of circumstances certain statements in the nature of conclusions or opinions derived from numerous inci-

dents may be rightfully submitted to a jury. But where the actual underlying facts are available to the witness (as in the instant case for the most part the admitted records as to the prices and dates of transactions were available, either for introduction in evidence or reference) there is no rule of evidence nor of right which requires the jury to formulate its judgment as to the existence of competitive conditions upon what counsel has designated "strong impressions, beliefs, or recollections," particularly where such "impressions" carry no detail of fact to give them substance. See Greenleaf on Evidence (16th Ed.), vol. I, page 549; Wigmore on Evidence (2nd Ed.), vol. IV, page 120.

There were no conditions in the testimony of witnesses offered on competition, which called for or made necessary the substitution of conclusions and impressions for the statement of facts, from which the jury could as easily draw its own conclusions and inferences as any of the witnesses whose testimony was offered. The fundamental facts which were required of these witnesses were neither evanescent in their nature nor complicated in their character. If known to the witness who desired to state his opinion, these underlying facts were equally as easy of statement as the opinion which was sought to be substituted therefor. As shown by the Record, in certain instances the underlying facts by way of records were actually

available and entirely disregarded and denied to the jury. (R. 344, 470, 500.)

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

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NOVEMBER, 1926.

APPENDIX

Brief analysis of some of the specific instances of exclusion of testimony objected to by the defendants is herewith set out:

(*a*) Faherty, a defendant manufacturer of pottery, was asked whether he found himself in competition with other members of the Association. (R. 344.) One of the important questions before the jury in the instant case was whether there was price competition between these defendants, and the defense desired this witness to express his own conclusions as to the competition between these defendants without defining the kind of competition, or any specific facts from which such conclusion or inference could be made.

(*b*) Shannon, a salesman of one of the defendant companies (R. 397), was asked on redirect examination whether he found himself "in active competition." Immediately subsequent to the exclusion of this question on the ground of calling for a conclusion, and being vague and uncertain, there appears (on page 398 of the Record) a statement in detail by this witness containing facts as to the form and kind of price competition which he engaged in, which were the primary facts upon which his answer to the question would have been founded. So it is evident there was no substantial error or injustice to these defendants.

(*c*) Efron, a jobber (R. 436), was asked whether he found any competition for his business among

"these people." This question was excluded as calling for a conclusion. Examination of the testimony of this witness (R. 434–435) shows that he had testified in detail as to some transactions taking place between himself and defendant manufacturers, and invoices of such transactions were introduced in evidence. (R. 437.) So it is apparent that the primary facts relative to the issue before this jury as to competitive conditions, of which this witness had actual knowledge, were permitted in evidence without objection, and therefore no substantial injury could have been done these defendants.

(*d*) Drugan, a salesman of one of the defendant manufacturers, and himself a defendant (R. 441), after being permitted on direct examination to state the primary facts with reference to his sales and methods of sale, was asked the question whether or not he cut his price to meet "that competition." (Undefined.) This question was excluded on the ground that it called for a conclusion of the witness as to several transactions which are not identified—vague, indefinite, and uncertain. Immediately thereafter this witness was permitted to testify without objection as to the primary facts of specific instances recalled, where he averred that he had so cut his price. It is evident that these defendants received the benefit before this jury of all the knowledge of price cutting to meet competition which this witness possessed, and therefore no substantial injury was done them.

(*e*) Weil, a jobber and retailer (R. 469) was asked whether there were instances in which there was a cutting of prices, although in his previous statement it appeared he had no specific recol-

lection, and although subsequently it appeared that he had complete records, which were readily available. The Court suggested that counsel have this witness refresh his recollection and then testify, if he could, as to the instances about which he had been questioned. (R. 469.) It is clear at this point that if any specific instances of this kind referred to in the question excluded had taken place that they could have been testified to as suggested by the Court, but that these defendants in lieu of such definite information desired the Court to permit this witness to testify as to his impressions.

(*f*) Thorndike, president of a large jobbing house which bought from these defendants (R. 512), after having stated that he recalled buying from these companies below their bulletin prices, was asked which had been most frequent, purchases at or below the bulletin prices. This question was excluded on the ground that it called for the conclusion of the witness as to a mass of transactions covering several years and afforded no proper basis for cross-examination. He then proceeded to testify as to specific instances of purchases below the bulletin price and as to certain specific facts with reference to competition. He then said, "I can not recall any other instances of competitive bidding on prices not specifically enough for testimony." (R. 514.) It is evident that where no greater knowledge of the specific details abides in the mind of this witness, who was carrying on a very large business, involving very numerous transactions, a statement from him based on that kind of recollection, comparing the instances of purchases at the bulletin with purchases below the bulletin, could be nothing more than his impression and

could not be a conclusion based upon a reliable recollection of known facts.

(*g*) Smith, treasurer of one of these defendant companies (R. 374-375), testified that he had knowledge of the sales made by his company "involving a great many transactions" throughout three years, and he was permitted to testify without objection that the sales were not "being made at our bulletin prices." He was then asked, "How much cutting from your prices did you notice?" The same reasoning, as applied in the next above instance likewise applies to the question here, that his conclusion as to the frequency or number of these price cuttings, in view of his own statement of the number of transactions involved, must in all human probability be of a largely speculative character, and the court said that he must substantiate such testimony by information from his records.

(*h*) Kirk, a manufacturer of pottery (R. 474), was asked whether he had not heard from time to time of other members of the Association who were cutting prices besides Abingdon, as to which he had just testified specifically. This question was likewise excluded on the ground that it was too vague and uncertain and afforded no basis for cross-examination. To this objection there might also be added that such testimony would be hearsay, if it was intended thereby to prove that other companies had been cutting, and would be clearly inadmissible. Neither the source nor the time of information is identified.

(*i*) Seifert, a jobber (R. 524), testified that he received the price bulletins but rarely referred to them; that he could not recall any instances where

different companies bid different prices for the same job; that when he went into the market, it was usual for him to get two or three or four bids of prices from different manufacturers. He was then asked, "How wide a range can you remember it as having taken?" Objection was interposed. Witness stated he could give no specific instance of such conditions in the large volume of business done. Witness did testify in detail from invoices in his possession as to certain prices being made by certain defendant companies and this without objection.

It is clear that wherever this witness had real knowledge as to conditions in the trade he was allowed to testify without objection to that knowledge, and that objection was only made when he was requested to give his impression of the range of prices which he received, where no specific recollection was retained. Such evidence would be of too speculative a character to be of value.

(*j*) Winzinger, a jobber (R. 497), was asked whether he observed any uniformity of prices at the time he was making purchases. This question was excluded as calling for a conclusion.

Thereafter he testified without objection in detail as to certain prices received from certain defendant companies, the underlying invoices for which he had examined and brought with him.

Thereafter he testified that he had all the necessary papers "back for ten years which were at the disposal of anyone at all; that they had been available to trial counsel for the past three weeks or a month; that he *himself did not claim to have compared them.*" (R. 500–501.)

Here again is a condition where all of the fundamental facts were available to the witness being examined and to trial counsel, where the witness admitted he had made no comparison upon which to answer the question as to uniformity, and where no effort had been made actually to establish from the available data the true conclusion as to uniformity. Yet it is insistently asserted that this jury must found its conclusions upon testimony of this character.

(*k*) Buda, a jobber (R. 493), had been examined as to competition among these defendants as evidenced by his experience in purchasing their goods and having refreshed his recollection from available invoices, testified at length (R. 491) as to certain prices which he had received, not, however, from defendant manufacturers but from outside or independent manufacturers. He then undertook to testify that he had received different prices from an outside company and one of the Association defendant companies. Upon questioning it developed that he could not identify the transaction, and he was then advised to go ahead and mention any other instances of like character, to which question he started to respond in the following language: "Well, the only way I used to purchase my goods was," to which general statement objection was entered. He was then asked, "Now, tell me the way you purchased your goods." Objection was interposed on the ground that the witness be confined to a specific instance as to which he could give information. This question was excluded upon objection and made the basis of the exception. The record shows that immediately thereafter this witness went into a full explanation of how he made

his purchases and was permitted to indicate that a certain specific defendant company had made lower prices than the other bidding concerns.

It is apparent that no substantial injury was done these defendants by the ruling, as the witness was permitted without objection to answer direct questions which brought to light the information which was desired by defendants' counsel.

It furthermore appears that the invoices which the witness had brought with him, containing the exact prices which he had received in the purchase of this pottery, had not been compared by him with the bulletin prices. (R. 495.)

A reading of the testimony of this witness will indicate that there was no exclusion of any real information relating to the issues of this case, but only the rejection of unsupported or insufficiently supported inferences.

Further, it appears that in substantially all these instances of exclusion the witness was permitted without objection to testify to any fundamental facts or specific instances, which established or tended to establish competition in this industry as carried on by these defendants.

It will be recalled that the defendants were permitted by stipulation to introduce in evidence tabulations (prepared by them from their books) showing prices made by the various defendant companies.

Careful examination of all these instances of exclusion convinces that there was no exclusion of this general line of testimony as to competitive conditions sought to be established by these defendants, but only the enforcement of a rule of evidence as

to the form of introduction of that evidence, which under circumstances here disclosed, was not unjust or prejudicial to these defendants; first, because better evidence was available and denied to the jury; and second, because all the underlying facts within the knowledge of the witnesses were introduced to the jury.

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 27

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE TRENTON POTTERIES COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

STATEMENT

This brief will be exclusively in the nature of a reply to the brief filed on behalf of the defendants (the respondents). Three new points are raised in that brief which were not considered in the opinion of the Circuit Court of Appeals, to which this writ of certiorari is directed, and which were therefore not considered in the original brief on behalf of the plaintiff (the Government). In addition to a reply to these points, we will make here a brief answer to certain of the points presented on behalf of defendants relative to the issues raised in the opinion of the Circuit Court of Appeals.

(The brief on behalf of defendants will be herein referred to as D. Br., and the original brief on behalf of plaintiff as P. Br. The numbering of points herein will follow that of D. Br.)

THE FACTS

Defendants open their brief with a criticism of the brevity of the statement of facts in the brief of plaintiff (pp. 3–7) and with a lengthy statement of the facts as seen from their point of view. It is unnecessary for this Court to make an exhaustive study of the facts. Their determination was for the jury. No question is raised that they were not sufficient to support their submission to the jury under the charge of the court.

The only suggestion that the Government has failed to prove a price-fixing agreement appears at p. 20 of D. Br. The argument is that the Government relies for proof upon the fact that bulletin prices were largely uniform. The fault with the argument is that the Government did not rely upon the comparative uniformity in bulletin prices as its sole proof of the unlawful agreement.

The basis of the Government's case on the facts was that basic price lists were actually adopted at meetings of the defendants' association. (R. 40–42, 393.) This fact alone would be sufficient to support a verdict, but the Government added other elements of proof. It was shown that prices and discounts were discussed at meetings of the association. (R. 476, 480, 487, 179–180.) It was shown

that various defendants consulted the secretary of the association in regard to "regulation prices" (R. 866 and other correspondence in Vol. II of the Record), and that complaints were made by members when other members were not adhering to the agreement. This was circumstantial evidence from which an agreement could clearly be inferred. It was shown that uniformity existed among the defendants in terms of credit (R. 766, 2592–2970), in crating charges (R. 777, 894–897), in extra charges for special work (R. 867, 940–943). This was further evidence from which the same inference could be drawn. It was further shown that there was a percentage of uniformity of approximately 80 per cent in the sales prices shown on the bulletins of the different companies. (R. 318.) This last was but one additional element of the proof.

QUESTIONS PRESENTED

The disputed issues in this case are issues of law—as to the jurisdiction of the court, the indictment, the admission and exclusion of evidence, the charge.

ARGUMENT

I

CONCERNING THE RULE OF REASON

It is suggested (D. Br. 39) that the Government seeks to set up a single exception—that of agreements in regard to *price*—to "the great standard"

of the common law as to reasonableness of restraints of trade.

We do not confine ourselves to prices, but present the doctrine that an agreement among those who control a substantial proportion of the production of a commodity to eliminate an essential subject of competition is an unlawful combination in restraint of trade. Thus, it is illegal to allot sales areas (*Addyston Pipe case,* 85 Fed. 271, aff. 175 U. S. 211) or to limit sales to a particular class of persons (*Eastern States Retail Lumber Dealers' case,* 234 U. S. 600; second count of this indictment), or to fix uniform prices (first count of this indictment), if such acts are done by agreement. No doubt, the evil of fixed prices is the type that has most frequently come to the attention of this Court and that has been most frequently condemned. This may be partly due to the fact that the effect of any one of these unlawful agreements is in common experience to influence and restrain competitive prices.

Such agreements have been read by the courts under the common-law lights of reason and public policy, and condemned. Cases cited in P. Br. 11–27.

At each trial, therefore, the duty upon the court is to describe to the jury the type of contract or combination which is unlawful, and to submit to the jury the questions whether or not the defendants have entered into such a contract or combination.

In equity of course the questions of fact as well as of law are for the court. Thus, in the *Steel Corporation case* in the lower court, 223 Fed. 55, 61 (D. Br. 34) the broad statement by the court that the basic question as to undue restraint of trade is one of fact is explained by the remainder of the paragraph from which defendants' quotation is taken, viz, that it was necessary for the court of equity to determine whether the Steel Corporation was as a matter of fact guilty of any of those trade practices, which as a matter of law would constitute undue restrictions upon competition or restraints of trade. So in the case at bar the question was properly submitted to the jury whether this combination was in fact one of that class, which by its inherent nature is unlawful under the decisions of this Court.

When a given state of facts has been treated by a high court in an authoritative way, the decision tends to establish a rule of law applicable in future cases to that particular state of facts. A series of equity decisions by this Court on similar states of fact might commence with the consideration of a question of fact and conclude with the establishment of a rule of law. Equity is no longer measured by the length of the chancellor's foot. The rule the interpretation of statute thus established by a long line of authority would be of automatic application in future cases under the same statute, whether civil or criminal.

However, it does not appear that the determination that an agreement upon uniform prices is an unreasonable restraint of trade even originated as a determination of fact. Not this question alone, but all questions as to the rule of public policy applicable to the validity of contracts, were determined at common law as questions of law for the court. Thus, on demurrer to a complaint at common law in *Oregon Steam Navigation Company* v. *Winsor*, 20 Wall. 64, 71, the validity of the contract was passed upon by this Court. Had the question been one of fact, it would of course have been left to the jury. The English rule was to the same effect. Cases cited in *United States* v. *Addyston Pipe & Steel Company*, 85 Fed. 271.

The difficulty of distinguishing between the concept of reasonable restraint of trade and the concept of reasonable price has led some trial judges into error.

On the one hand is the danger of holding that because reasonableness of price is not an issue there can be no question of reasonableness in a case. On the other is the danger of holding that because reasonableness of restraint is in issue so also is reasonableness of price?

The trial judge in the case at bar made loose statements in answer to a motion by defendants' counsel that indicated a possible misapprehension on his part of the former type. But this could have no effect upon the case. He charged the jury

upon a correct statement of the law. He may have been under the mistaken impression that the substantive rule would be different in equity and in criminal cases. He did not so state in terms. But assume the error and it was ineffective. To the jury he gave the established rule of law, applicable alike in equity and on indictment, that an agreement upon uniform prices on the part of those controlling a substantial proportion of an industry is unlawful.

The error as to relevance of reasonableness of price is illustrated in the charges to the juries in the *Aileen Coal* and *Atlas Portland Cement cases,* quoted at pp. 35–37, footnote, of D. Br. The doctrine of those cases that the fairness of the agreed price is an issue for the jury would, however, render the Sherman Act unconstitutional under the doctrine of the *Cohen case.* And the judge who tried the *Aileen Coal case* has himself recognized that the offense stated in the second count of the present indictment alleging the agreement to deal only with the special class of jobbers is "an illegal restraint of trade under the Sherman Act, unenforceable at law and subjecting the participants to a criminal prosecution thereunder." *United States* v. *Southern Wholesale Grocers' Association,* 207 Fed. 434, 439.

A like misconception appears in the construction at D. Br. 35 of the case of *Thomsen* v. *Cayser,* 243 U. S. 66.

That case was one for damages under Section 7 of the Sherman Act, and the question of the reasonableness of the rate was determined by the jury as an element in their determination of the quantum of damages. 243 U. S. at p. 88. But the question whether the rate-making agreement was in itself an unlawful restraint of trade was considered at length by both the Circuit Court of Appeals and this Court as proper for their determination, rather than for the determination of the jury. 243 U. S. at pp. 82–87. The following quotation appears at p. 88:

> The next contention is that the fact of combination should have been submitted to the jury and not decided as a matter of law by the court. We are unable to assent. There was no conflict in the evidence, nothing, therefore, for the jury to pass upon; and the court properly assumed the decision of what was done *and its illegal effect.* (Italics ours.)

There is a striking conflict between the reliance placed on the *Aileen Coal* and *Atlas Portland Cement cases* by defendants, and the strong statement at p. 33 of their brief that proof of the unreasonableness of the uniform prices is *"an issue which is not at all involved in the case."* We concur in the latter view.

II

CONCERNING VENUE

The trial court charged the jury that the agreement constitutes the offense under the Sherman Act and that an overt act need not be proven. But in the case at bar an overt act renewing the conspiracy in the Southern District of New York was essential to jurisdiction. The Government's view is that—

> (1) Failure by defendants to object or except or call the attention of the trial court (*a*) precludes them from raising the point on appeal unless the error be so serious as to justify notice by the appellate court without assignment or error, and (*b*) indicates the understanding of all parties at the trial that under the evidence there could be no doubt of venue; and that—
>
> (2) Evidence probative of venue was in fact introduced in quantity by both sides, so that there was no conflict in evidence to submit to the jury.

The facts essential to venue are, of course, to be ascertained, not from the charge of the court but from the evidence.

Both court and counsel naturally assumed in the instant case that it was unnecessary to charge the jury upon an undisputed point. Had defendants' counsel presented a request to charge upon this ground, the charge would, no doubt, have been modified. But counsel made his request upon an en-

tirely different ground. (D. Br. 43.) In the absence of a proper request at the trial defendants on appeal must contend that this is a plain and highly prejudicial error. To this a short answer is that there was no conflict in the evidence to present to the jury.

Defendants further take occasion to criticize the Government for bringing the case to trial in New York. (D. Br. 46.) It is self-evident that the principal market of the defendants was in the Southern District of New York, and it is submitted that it was not improper to try a group of scattered conspirators in the district which was the principal theater of their conspiracy and immediately adjacent to the home of the majority.

III, IV

CONCERNING THE ADMISSION OF EVIDENCE

At D. Br. 54, defendants sum up their criticism of the question addressed on cross-examination to defendants' witness, Bantje, whether he did not know that the corporation, which he had been called to the stand to represent, had pleaded guilty to a violation of the Sherman Act. They argue that because we defend the question as addressed to the *bias* of the witness, we must concede that it was not addressed to his *credibility*. They misconceive our purpose. We *were* attacking his credibility. Evidence of bias is directly relevant to credibility.

The reasons supporting the question on redirect examination of Dyer, in regard to appearance of the secretary of the customer-jobbers' association before the Lockwood Committee, have been set forth in the opening brief.

V

CONCERNING THE EXCLUSION OF EVIDENCE

The gist of the offense under the Sherman Act is the unlawful agreement. It is immaterial whether the agreement is carried out. *Nash* v. *United States,* 229 U. S. 373. An ordinary knowledge of human nature suggests that the parties to such agreements will frequently break away and place immediate private advantage above loyalty to the unlawful conspiracy. The result is a defense based on the continuance of competition and irregularity in prices, the theory being that noncompliance with the terms of the alleged agreement evidences its nonexistence.

On the trial, therefore, defendants introduced evidence of a large number of instances in which they had not adhered to the terms of the agreement with which they were charged. Such facts were indirectly evidentiary on the question of whether an agreement had been in fact entered into.

They were not directly material or operative facts in the sense of constituting an element of the crime itself. They were indirectly material or

evidentiary facts. The admission of testimony as to merely evidentiary facts is largely within the discretion of the trial court. *Moore* v. *United States,* 150 U. S. 57, 60.

In the case at bar the trial court adopted the practice of admitting evidence as to actual facts of this type. It excluded statements by defendants' witnesses of their conclusions or inferences from such facts.

There was thus ample evidence of primary facts before the jury to present the defense. To exclude the vague and indefinite conclusions, themselves embodying the final inferences to be drawn from the primary facts, was a sound exercise of discretion. *Spring Company* v. *Edgar,* 99 U. S. 645, 658; *Chateaugay Iron Co.* v. *Blake,* 144 U. S. 476, 484.

The case might be otherwise if defendants lacked evidence of the facts themselves. But the Record showed (see P. Br. Point V and Appendix), that actual records were available.

Assume, however, that some or all of the rulings in question were error. The error is not prejudicial. Ample evidence was admitted to place before the jury the defense that was being offered.[1]

[1] The 200 witnesses for the Steel Corporation referred to by defendants (D. Br. 69–70) appeared in an equity case before a special examiner. Under those circumstances testimony of doubtful materiality is admitted without fear of misleading a jury. Indeed, the record in the *Steel case* covered 30 volumes collected over 166 days of testimony. Such a procedure would be unthinkable in a criminal action. As it is, the testimony of defendants' witnesses in the case

VI

CONCERNING THE FIRST COUNT

The argument in D. Br. 71–76, to the effect that the first count of the indictment does not state a crime, and is vague and indefinite, is based upon the assumption in the first point of their brief that to describe a uniform price-fixing agreement is not to describe an unlawful restraint of trade. In other words, decision on this point inevitably follows decision on the first point. An agreement among those who manufacture and sell upward of 85 per cent of all the sanitary pottery manufactured in the United States (Indictment, R. 6) to fix uniform prices for the sale of said pottery (Indictment, R. 9), and to do the other acts charged in that count of the indictment, is unlawful. P. Br. 11–27, and authorities there cited.

Defendants here contend that the circumstances governing reasonableness, and the reasonableness of the prices fixed, must be set forth in the indictment. They again cite (D. Br. 72) the *Aileen Coal* and *Atlas Portland Cement cases.* We

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at bar covers 297 of the 630 pages devoted to testimony, and their exhibits cover 1,967 of the 2,860 pages devoted to exhibits.

Furthermore, the witnesses in the *Steel case* were called primarily to testify as to the general competitive conditions in that commerce, all of which were there in issue. Such a broad issue by its nature does not permit of the specific evidence of facts which may be readily provided where the issue, as here, is solely as to competition in prices.

have already noticed, *supra*, p. 8, the striking conflict between this argument and their repudiation (D. Br. 30) of the issue of reasonableness of prices.

They further cite the *Chicago Board of Trade* (246 U. S. 231) and *National Window Glass* (263 U. S. 403) *cases* in this Court. The *Board of Trade case* involved a rule strictly limited as to time, type of transaction and scope of operation. The *Window Glass case* involved an attempt by a minority to preserve their competitive status against those who occupied the substantial position in the industry, and without any effect on prices. Neither is relevant to an agreement among those who occupy the position in an industry occupied by these defendants to fix standard and permanent prices for the commodity.

VII

CONCERNING THE SECOND COUNT

(A) *An agreement to sell to jobbers only was properly charged in the indictment.*

Defendants argue (D. Br. 76–79) that the phrase in the first paragraph of the second count of the indictment which refers to the conspiracy to confine "sales of sanitary pottery to a special group selected by said defendants by an agreement and known and denominated by them as 'legitimate jobbers,' " is to be read as referring to a group within the group of jobbers. Under ordinary rules of construction, the class of jobbers constitute a special group as distinguished from manufacturers, re-

tailers, etc.; and "legitimate jobbers" may well mean, as they did to the members of this association, those who had an exclusive jobbing business.

That the "legitimate jobbers" of the defendants were taken by the pleader to mean jobbers as a class, or special group, appears in the second paragraph of the second count, where "legitimate jobbers" are distinguished from other classes of consumers who are not jobbers at all (R. 12):

> That certain of said so-called "legitimate jobbers" carried on business within the Southern District of New York and maintained within said district offices and other places of business for the receipt, storage, sale, and distribution of sanitary pottery; that certain persons, firms, and corporations such as builders, owners, architects, general contractors, plumbing contractors, and plumbers, other than the said so-called "legitimate jobbers" selected by the defendants by agreement as aforesaid, maintained offices and other places of business within the Southern District of New York and were desirous of purchasing and attempted to purchase sanitary pottery directly from the defendants.

(B) *The court properly charged the jury that they must find an agreement.*

Defendants take exception (D. Br. 80) to the following portions of the charge (R. 702, 703):

> Secondly, that not only was such an understanding reached or agreement made or

> policy determined upon but that the defendants cooperated from time to time to carry out and enforce such an understanding. * * * The statute, however, condemns the adoption of any policy, agreement, or understanding on the part of a group of manufacturers in control of a substantial part of an industry to confine its sales to any class to the exclusion of others.

It is clear that it is not illegal for two individual manufacturers to have at the same time a common but independent policy to sell only to jobbers. Such a policy to limit sales to a particular class of middlemen is generally understood to retard progressive economic development, but it is not illegal unless determined upon by agreement. The trial court made clear to the jury that it is the element of agreement or combination in the concerted adoption of or determination upon a policy that renders it illegal.

The whole paragraph of the charge, from which defendants have quoted a portion, is as follows (R. 702–704):

> Under the second count of the indictment evidence has been offered on behalf of the Government to show an agreement or understanding that no sales by any member of the association should be made directly to owners of property, to builders of property, to architects, or to plumbers, and that the sales should be made only to or through so-called "legitimate jobbers." Secondly, that not

only was such an understanding reached or agreement made, or policy determined upon, but that the defendants cooperated from time to time to carry out and enforce *such an understanding.* Now, again I should repeat to you that the mere making of such agreements, if you find they were made, or such understandings, if from all the facts and circumstances you find that such understandings were reached, would in and of themselves be illegal, even though none of them were successfully carried out, and that would be true, even though the association or combination provided no machinery to carry them out. You should not concern yourself with the question whether in the absence of such an agreement the defendants nevertheless would have restricted their sales to jobbers, nor are you to inquire whether that is a commendable or usual trade practice. The law regards an agreement among manufacturers of a particular commodity to restrict their sales to a designated class to be in the nature of a boycott of those who do not fall in that denominated class and therefore has declared such an agreement to be illegal and to be in violation of the Sherman Act. *As I have had occasion to say before, every individual manufacturer has an absolute right not only to sell at any price that he chooses or to make any profit that he chooses, but to confine his sales to any group that he may select or refuse to sell to any group that he may select. The statute, how-*

> *ever, condemns the adoption of any policy, agreement, or understanding* on the part of a group of manufacturers in control of a substantial part of an industry to confine its sales to any class to the exclusion of others. If you find that the minds of these defendants met and they tacitly or expressly agreed to restrict their sales to jobbers, then the defendants have contravened the Sherman Act and are guilty of combining and conspiring to restrain trade and commerce in that commodity as charged in the second count of the indictment. If, therefore, you find from all the evidence bearing on the subject some promise, either express or implied, or any assent to the proposition that the defendants should conform their conduct to some prescribed rule the aim and purpose of which was to restrict their sales to jobbers only, then, under the law the defendants are guilty of a combination and conspiracy to restrain trade. And if you find that the defendants did so combine and conspire to restrict their sales to jobbers only, any good intentions they may have had in such course will not make such an agreement legal or relieve defendants from the consequence of their acts. You will not consider in this connection any suggestion that the course pursued was necessary to the protection of the jobber or promotive of the public welfare. (Italics ours.)

Read as a whole, therefore, this portion of the charge clearly makes illegality dependent upon agreement.

Even if read alone and apart from their context, however, the references to "policy determined upon" may be taken as merely a practical description of a method of reaching an agreement between competitors. This was the situation in the steel trade at the time of the Gary dinners. Those dinners were informal meetings of the leaders of the steel industry, at which prices and terms had been discussed and "declarations of purpose" entered into. No contracts had been made. But both opinions in the District Court (*United States* v. *United States Steel Corporation,* 223 Fed. 55), although they united upon the dismissal of the Government's bill on other grounds, were in agreement upon the illegality of these dinner discussions and their "declarations of purpose." Opinion of Judge Buffington, at p. 160; concurring opinion of Judge Woolley, at p. 175.

(C) *Whether an agreement to confine sales to jobbers is a commendable trade practice is not properly in issue.*

The problem whether concerted restriction, by a substantial proportion of those engaged in the production of a given commodity, of sales to a special class of middlemen, e. g., jobbers, is a commendable trade practice is not properly for the jury. This class of restrictive agreement falls within the same principle of law as does the type of restrictive agreement charged in the first count of the indictment.

The judge was making clear to the jury that the gist of an offense against the Sherman Antitrust Act is the *agreement*. In later portions of the charge this was amplified, and the court carefully avoided the danger of allowing the jury to conclude that illegality would lie merely in contemporaneous and independent action to the same effect by different individuals. He recognized the correctness of the quotation from *United States* v. *Piowaty*, 251 Fed. at p. 377, which heads the argument in D. Br. 86 on this point:

> In my opinion, unlawful agreement is the essence of the offense of combination or conspiracy under the Sherman Act. It is what separates what is permitted from what is forbidden. To hold it illegal for persons in the same business and same trade organization, after exchanging information and views, to act in the same way, but independently of each other, on buying, selling, or prices, would extend the scope of the act beyond anything heretofore decided and beyond its proper meaning, and would cause the greatest confusion and uncertainty.

and evidenced that recognition by continuing the charge, as follows (R. 703):

> * * * As I have had occasion to say before, every individual manufacturer has an absolute right not only to sell at any price that he chooses or to make any profit that he chooses but to confine his sales to any group that he may select or refuse to sell to any

> group that he may select. The statute, however, condemns the adoption of any policy, agreement, or understanding on the part of a group of manufacturers in control of a substantial part of an industry to confine its sales to any class to the exclusion of others. If you find that the minds of these defendants met and they tacitly or expressly agreed to restrict their sales to jobbers, then the defendants have contravened the Sherman Act and are guilty of combining and conspiring to restrain trade and commerce in that commodity as charged in the second count of the indictment. If, therefore, you find from all the evidence bearing on the subject some promise, either express or implied, or any assent to the proposition that the defendants should conform their conduct to some prescribed rule the aim and purpose of which was to restrict their sales to jobbers only, then under the law the defendants are guilty of a combination and consipracy to restrain trade.
>
> See also R. 695, 697–698.

To constitute an unlawful combination the agreement need not, of course, be the type of contractual agreement recognized by the law. Nor need it be express. Thus Professor Williston on Contracts, Vol. I, Sec. 2:

> An agreement is the expression by two or more persons of assent to some present or future performance by one or more of them. Agreement is in some respects a wider term

> than contract. * * * It also covers promises to which the law attaches no legal obligation.

And in *United States* v. *United States Steel Corporation,* 251 U. S. 417, 440, 445, this Court recognized that even "the social form of dinners" might be a violation of the law. Both opinions in the District Court were in agreement that they were illegal. *Supra,* p. 19.

Respectfully submitted.

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NOVEMBER, 1926.

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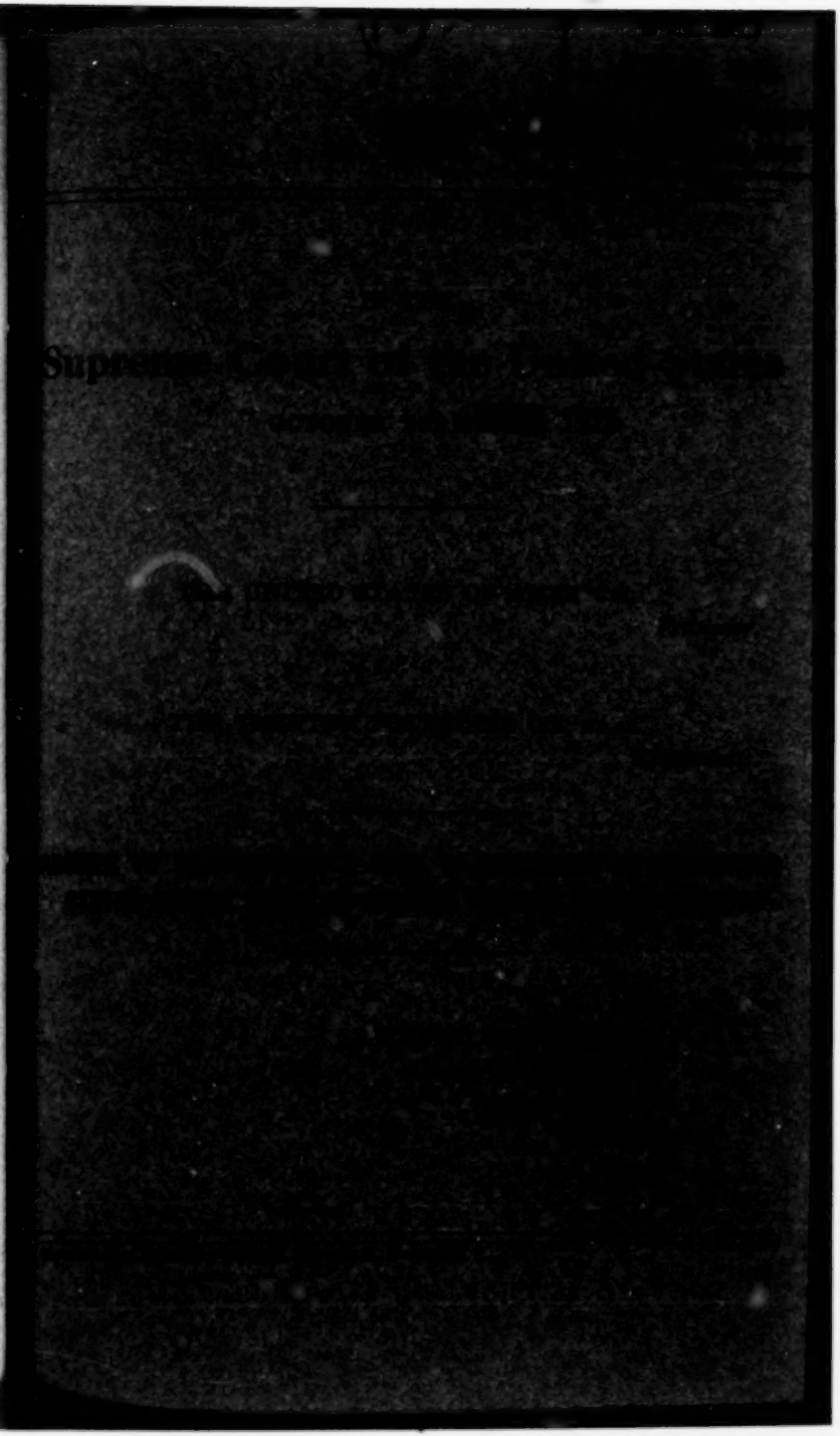


IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

THE UNITED STATES OF AMERICA,
Petitioner,
v.
THE TRENTON POTTERIES COMPANY, *et al.*,
Respondents.

No. 591

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

The respondents to the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit appear in response to the notice served upon them by the petitioner and respectfully show that the petition should be dismissed and a writ of certiorari denied for the following reasons:

I.

Because this court has no jurisdiction to grant a writ of certiorari to review a decision of the Circuit Court of Appeals in favor of the defendants in a criminal case.

This was held in *U. S.* v. *Dickinson,* 213 U. S. 92, under the Act of 1891, and the Act of 1911 did not enlarge the power of the court in this respect.

II.

The petition for the writ is inaccurate and misleading.

In *Furness, Withy & Co.* v. *Yang-Tsze Ins. Ass'n* (1916), 242 U. S. 430, this court laid down the rule governing such petitions, saying (p. 434), "Unless these are carefully prepared, contain *appropriate* references to the record and present with *studied accuracy, brevity and clearness* whatever is essential to ready and adequate understanding of points requiring our attention, the rights of interested parties may be prejudiced." (Italics by the court.) The petition fails to do this in the following respects:

(1)

The "statement of the case" in the petition is inaccurate and misleading.

The statement as to what the Circuit Court of Appeals held (Petition, p. 3) is not only incomplete, but inaccurate. It studiously avoids mention of the most important holding of the Circuit Court of Appeals which, as that Court said, "went to the foundation of the prosecution"—that is, the holding that Section One of the Sherman Act means the same thing, however its enforcement may be sought, and that, "The statute cannot mean one thing on the criminal side of the court and another on the civil side" (C. C. A. opinion, p. 6). The petition does not attack the correctness of this proposition.

As a corollary the Circuit Court of Appeals held that as the statute was passed to prevent public in-

jury by prohibiting *undue* and *unreasonable* restraints of trade, the question whether the defendants had been guilty of such a restrain was a question for the jury, and not, as the petition alleges, that criminal liability was dependent upon proof of injury to the public. This does not, as the Government charges, "substitute the composite opinions of twelve jurymen as to what should be the law of the land for a great statute" (Petition, p. 3)—it merely leaves to the jury the question whether the defendants have committed acts which violate the provisions of the statute as this court has interpreted them. See 221 U. S. at page 78.

(2)

The statement in the petition of the questions involved is also inaccurate and misleading.

1. The first and principal question involved is whether the standards of reason announced by this court in the *Standard Oil* and *Tobacco* cases are confined to civil suits and suits in equity, or apply as well to criminal proceedings. This is not mentioned in the petition. The trial court ruled that these standards have no application in a criminal case and could not be considered *either by the jury or by the court* (R. p. 665, fols. 1993-5; p. 666, fols. 1996-7). This the Circuit Court of Appeals held to be error. It also held that it was error to exclude from the jury the question whether the defendants' conduct resulted in the undue and unreasonable restraint prohibited by the statute and to deny defendants' requests that this issue be submitted to the jury. Surely the correctness of this ruling of the Circuit Court of Appeals is involved in the Government's application, yet the petition contains no suggestion with respect to it.

2. The second question referred to in the petition (p. 4) is inaccurately stated. The Government in the indictment alleged the formation of a combination or conspiracy, not in the Southern District of New York, where the indictment was found, but elsewhere; charging, in order to give the court jurisdiction, that the defendants committed certain specified overt acts in that District (R. pp. 9-11, fols 26-32; pp. 13-14, fols. 37-41). The government introduced evidence which it contended showed the formation of such a conspiracy elsewhere than in the Southern District of New York and the commission in that District of the overt acts specified in the indictment. The Government's statement (Petition, p. 4), that the defendants by evidence which they adduced admitted these allegations, is untrue. The petition contains no appropriate reference to the record with respect to this. The Government does not, and cannot, point out any evidence adduced by the defendants which admits such acts. All of the allegations of the Government were denied by the defendants, who put in evidence which they insisted disproved both the formation of the combination or conspiracy and the alleegd overt acts. The trial court submitted to the jury only the question whether there was any combination or conspiracy, not only excluding from their consideration any question as to whether there was any undue or unreasonable restraint of commerce, but also instructing them that "A mere agreement * * * constitutes an offense, and it is immaterial whether anything is done by the combination, its members or its agents toward the carrying out or performance of such agreement. The mere making of the agreement, though nothing is ever done towards its accomplishment is in itself a violation"

(R. p. 694, fols. 2081-2) and further that if they found any combination or conspiracy, the defendants were guilty, *whether it was carried out or not, or whether any effort was made to carry it out* (R. p. 695, fol. 2084; p. 697, fol. 2090; p. 723, fols. 2167-8). The question is not, as stated in the petition, whether the court was required to charge on the subject, but whether the charge delivered by the court correctly stated the law in its instruction to the effect that the commission of overt acts upon which the jurisdiction of the court depended, need not be proved by the Government or found by the jury.

3. The so-called "minor questions" are minor only by comparison with those already discussed.

(*a*) The defendants, to disprove that they had refrained from competition, called a number of their customers to show that they continually engaged in competition, which testimony the trial court excluded on the ground that it was "opinion evidence" (R. p. 339, fol. 1016; p. 344, fols. 1031-2; p. 394, fol. 1182; p. 398, fols. 1191-2; pp. 434-6, fols. 1301-7; p. 441, fol. 1323; p. 465, fol. 1395; p. 469, fol. 1406; p. 466, fol. 1397; pp. 511-512, fols. 1533-5; pp. 375-6, fols. 1123-6; p. 474, fol. 1420; pp. 466-7, fols. 1398-1401; p. 525, fol. 1575; p. 497, fol. 1491; p. 491, fols. 1471-2). The propriety of such evidence was unquestioned in the *Steel* case, where over two hundred witnesses gave testimony of just the character here excluded, which was most important in the decision of the case. (*United States* v. *U. S. Steel Corp.*, 251 U. S. 417, 448.)

(*b*) At the trial the Government did not "inquire into the possible bias" of Mr. Bantje, but was allowed to show that he was employed by a corpora-

tion affiliated with another corporation which had pleaded guilty to a violation of the Sherman Act (R. pp. 453-6), and this upon the express ground that it affected the credibility of the witness (R. p. 454, fol. 1360, p. 456, fols. 1367-8). The Government was also allowed to show that a Mr. Hanley, with whom the Secretary of the Sanitary Potters Association had corresponded, had been examined by the Lockwood Committee, a local legislative investigating committee whose activities were the subject of much discussion in the District, for the purpose of showing why the defendants were not engaged in certain alleged activities which the defendants had disproved, and this although it did not appear that any defendant had ever heard of such examination or that it had any relation to the matters covered by the indictment (R. pp. 189-193, fols. 566-578). The Circuit Court of Appeals held that these rulings were error, and although it refers to them as minor questions, it regarded them of sufficient importance to comment upon them as "a favorite and very modern form of verbal assault", which has no place in a criminal trial (C. C. A. opinion, p. 9). The propriety of this characterization is apparent.

(3)

The statement of "The Facts" in the petition is merely a statement of the Government's interpretation of its own evidence.

The statement in the petition merely summarizes the Government's evidence. It omits to state that every fact there referred to was denied by defendants, who introduced evidence in support of their denial. As a statement of the Government's contentions it is unexceptionable. To call it a statement of facts is misleading.

(4)

The Government's "Reasons for granting the petition" are insufficient.

The Circuit Court of Appeals did not hold that it was for the jury to decide whether "such an agreement" as is outlined in the Government's so-called statement of facts constituted an undue or unreasonable restraint of trade. What it did hold was, first, that the trial court's ruling that whether a combination or conspiracy was an undue or unreasonable restraint could not be considered, either by the jury or by the court, was error; and, second, that it was for the jury to determine whether the defendants were guilty of such acts as would constitute the undue and unreasonable restraint prohibited by the statute. The question of reasonableness is not essentially legal, but has been held to be a question of fact. (*United States* v. *U. S. Steel Corporation,* 223 Fed. 55, 61, 78; affd. 251 U. S. 417.) Under the clear statement of the law by this court in the *Standard Oil* and *Tobacco* cases, it cannot properly be called an immaterial element. It is no more speculative in a criminal prosecution than in a suit in equity, where the Government admits it must be considered. That the Government finds it difficult of proof is no ground for extraordinary relief. Such difficulty is not uncommon; in fact it is a difficulty with which the Government has been compelled to deal in a number of cases since the decisions in the *Standard Oil* and *Tobacco* cases were announced. See *United States* v. *Keystone Watch Case Co.* (D. C. E. D. Pa. 1915), 218 Fed. 502, 507, 516; *United States* v. *Whiting* (D. C. Mass., 1914), 212 Fed. 466, 475; *United States* v. *Cement Mfr'rs. Pro-*

tective Ass'n. (D. C. S. D. N. Y., 1923), 294 Fed. 390, 400; *United States* v. *St. Louis Terminal Ass'n.*, 224 U. S. 383, 394; *Nash* v. *United States*, 229 U. S. 373, 376; *United States* v. *Colgate & Co.*, 250 U. S. 300, 307; *American Column Co.* v. *United States*, 257 U. S. 377, 399-400; *Window Glass Mfr'rs* v. *United States*, 263 U. S. 403, 413. It is certainly no ground for denying defendants their constitutional right to have the question of their guilt or innocence tried by a jury.

III.

Because of other errors committed by the District Court not specifically referred to in the opinion of the Circuit Court of Appeals.

(1) The District Court erroneously denied respondents' requests for charges to the jury embodying relevant propositions of law announced by this Court in *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *Nash* v. *United States*, 229 U. S. 373, and other cases. (Respondents' requests Nos. 22-31, R. pp. 673-675, fols. 2016-2025; p. 727, fols. 2180-1). The twenty-fifth request (R. pp. 673-4, fols. 2019-2020) is in the very language of this court in *Chicago Board of Trade* v. *United States*, 246 U. S. 231.

(2) The District Court submitted the second count to the jury with the erroneous construction that it alleged an agreement to confine sales to a "class" instead of to a special group, and denied

respondents' requests to charge Nos. 54-59 (R. pp. 683-4, fols. 2048-2052; p. 728, fol. 2183) and erroneously charged that the law prohibits an agreement to confine sales to a class (R. p. 703, fol. 2108).

IV.

If this court finds that the judgment of the Circuit Court of Appeals was correct such judgment should be affirmed without regard to the reasons given by that Court for its judgment.

The office of a writ of certiorari is to bring up for review the correctness of the judgment of the court below, and not of the reasons given by that court for its judgment. This court will not consider any question where its decision with respect thereto cannot result in the reversal of the judgment below. *United States* v. *Evans,* 213 U. S. 297. As this court said in *Binney's Lessee* v. *The Chesapeake & Ohio Canal Co.,* 8 Peters, 214, 219:

> "Where error exists in the proceedings of the Circuit Court, which will justify a reversal of its judgment, this court may send back the cause, with such instructions as the justice of the case may require. But if, in point of law, the judgment ought to be affirmed, it is the duty of this court to affirm it. 6 Cranch. 268; 2 Cond. Rep. 367. We cannot, with propriety reverse a decision which conforms to the law, and remand a cause for further proceedings."

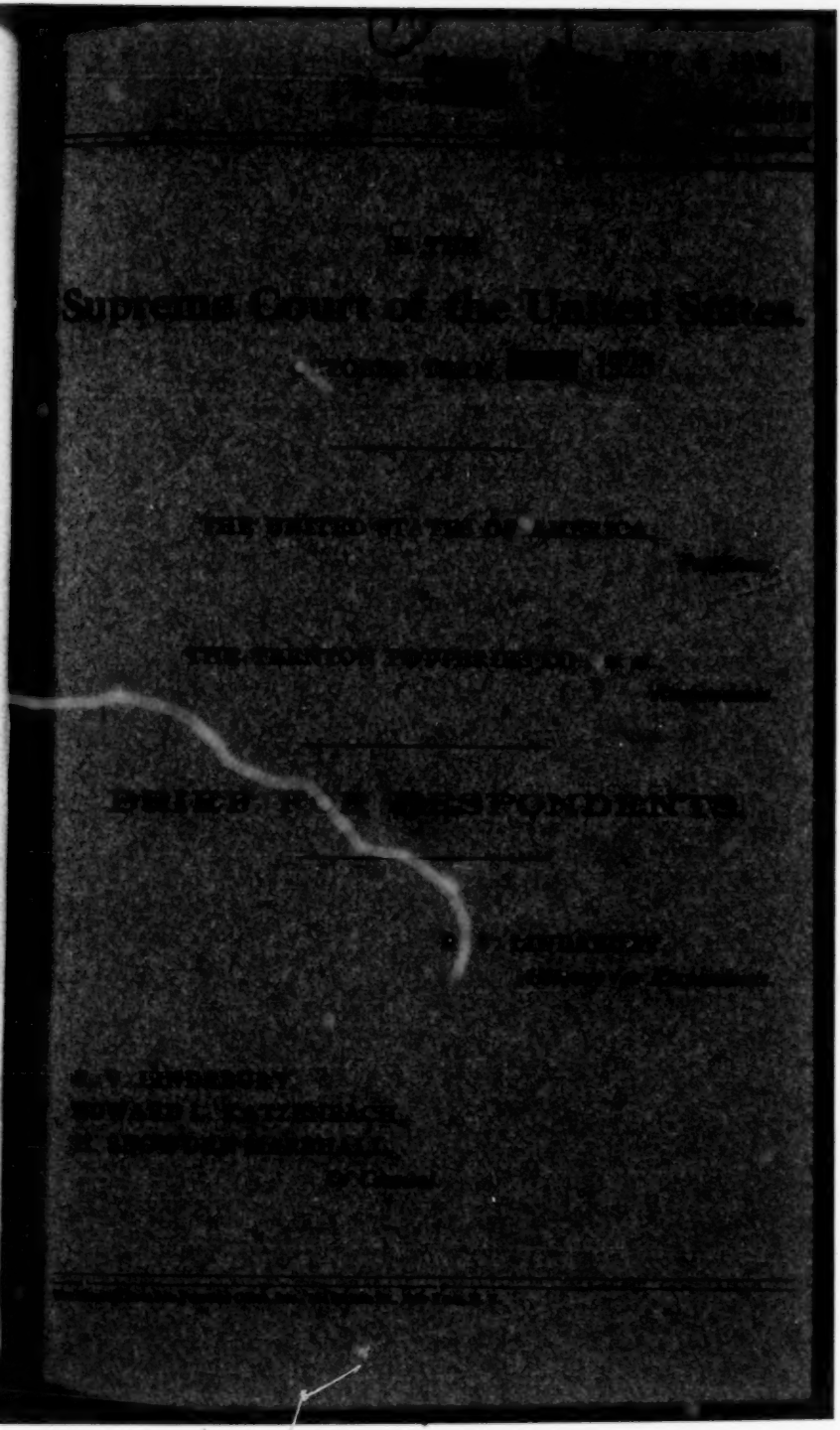
The Government does not question the correctness of the ruling of the Circuit Court of Appeals that the meaning of the Sherman Act is the same whatever the nature of the proceeding in which it may be considered and that it cannot have a mean-

ing on the criminal side of the court which differs from its meaning on the civil side. Nor does the Government contend that in a case where the jurisdiction of the District Court depends upon the commission of overt acts within the district, a conviction can be had without a finding by the jury that such overt acts have been committed. Entirely apart, therefore, from any other considerations, the judgment of the District Court was erroneous on these points and the judgment of the Circuit Court of Appeals reversing it and remanding the case for a new trial was correct.

RICHARD V. LINDABURY,
Attorney for Respondents.

Dated September 30, 1924.

NOTE: The notice served with a copy of the petition upon counsel for the Respondents on August 19, 1924, contains the statement that "Brief in support of the petition will be served upon you later." Rule 37 of this Court requires that Petitioner's brief, if any is to be filed, shall be served upon Respondents two weeks before the day fixed for the presentation of the petition. Under Section 4 of Rule 37 the petition must be submitted on October 6, 1924, the first motion day after the expiration of four weeks after it was filed, and notice was accordingly given for that day. Petitioner's time to serve its brief, therefore, expired on September 22, 1924. As no brief has yet been served, it is assumed that none is to be filed, and that if Petitioner files any brief which has not been duly served upon Respondents, and to which they have therefore been unable to reply, the court will decline to consider it.



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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924.

THE UNITED STATES OF AMERICA,
Petitioner,

AGAINST

THE TRENTON POTTERIES CO., *et al.*,
Respondents.

No. 591.

BRIEF FOR RESPONDENTS.

Although this brief was not filed three days prior to the presentation of the petition, as required by Rule 37 of this Court, this is due to the fact that the government's brief was received by counsel for Respondents only five days before the date fixed for the presentation of the matter, instead of two weeks before, as required by the same rule. In view of this circumstance, the respondents respectfully submit that their brief should be considered if the Court considers that of the government.

The respondents are unable to concur in the view that the court will have to make but few references to the record. In the following argument respondents will find it necessary to make certain references to the record to correct inaccuracies in the statements in the government's brief, and will make others in order to comply with the direction of this court in *Furness, Withy & Co.* v. *Yang Tsze Ins. Ass'n* (1916), 242 U. S. 430, at page 434, that the petitions, answers and briefs in such cases as this should contain appropriate references to the record, so that the court can readily verify the statements made in the course of the argument.

Statement of the Case.

The Indictment.

This case comes before the court on the petition for a writ of *certiorari* to the Circuit Court of Appeals for the Second Circuit.

The Respondents were indicted in the Southern District of New York for a combination or conspiracy, in violation of Section 1 of the Sherman Act. The first count alleges a conspiracy to fix and maintain uniform, arbitrary and non-competitive prices for sanitary pottery, to refrain from competition as to price, and the second count alleges a conspiracy to limit their sales to a special group selected by them and termed legitimate jobbers (R. pp. 4-15). All of the respondent corporations are alleged to be corporations of states other than New York (R. p. 4), and it is not alleged that any of them have plants in the Southern District of New York. None of the individual respondents are alleged to have resided in that District. It is not alleged that the combination or conspiracy was formed in the District, but it was charged that it was carried out by overt acts within the District (R. pp. 9-10, 13). There is no allegation that prices were raised, or that they were excessive or unreasonable.

The Subsequent Proceedings.

The respondents all pleaded not guilty. They were tried, were convicted and were either sentenced to varying terms of imprisonment or to fines. The convictions were reversed by the Circuit Court of Appeals, and the case remanded to the District Court for further proceedings. On August 15, 1924,

the petition for a writ of *certiorari* was filed with the Clerk of this Court, and on August 19, 1924, the respondents were served with copies thereof, together with a notice that the petition would be submitted on October 6, 1924, and that briefs in support of the petition would be served later. On October 1, 1924, three copies of the brief were delivered to counsel for the respondents.

The Material Facts.

The trial court held that the construction of the Sherman Act announced by this court in the Standard Oil and Tobacco cases had no application in a criminal proceeding (R. p. 83, fols. 248-9; pp. 665-6, fols. 993-7). It denied nine of the respondents' requests to charge embodying constructions of the Sherman Act announced by this court. Requests Nos. 22-30, both inclusive (R. pp. 672-5, fols. 2016-2024; p. 727, fols. 2180-1). It excluded certain testimony offered by the respondents to show the existence of competition (R. p. 344, fols. 1031-2; pp. 397-8, fols. 1191-2; p. 436, fol. 1307; p. 441, fol. 1323; p. 466, fol. 1397; p. 469, fol. 1406; p. 512, fol. 1535; p. 376, fol. 1126; p. 474, fols. 1420-1; p. 467, fol. 1399; p. 468, fol. 1404; p. 525, fol. 1575; p. 497, fol. 1491; p. 498, fol. 1492; p. 493, fols. 1478-9; it allowed the Government to prove that a Mr. Hanley had been examined by the Lockwood Committee, a local legislative investigating committee (R. pp. 189-190, fols. 566-9). It also allowed the Government to show that the J. L. Mott Iron Works, a corporation affiliated with the J. L. Mott Company, by whom one of the respondents' witnesses, a Mr. Bantje, was employed, had pleaded guilty to a violation of the Sherman Act (R. p.

453, fol. 1358; p. 454, fol. 1362), upon the theory that this affected the credibility of the witness (R. p. 456, fol. 1368). No actual agreement was offered in evidence, but the government attempted by the introduction of circumstantial evidence to raise the inference that an agreement existed. On one occasion, in December, 1918, the President of the Sanitary Potters' Association urged a *reduction* in prices because of the abnormal situation at the conclusion of the War (R. p. 99, fols. 295-6; Govt.'s Ex. 97, R. pp. 884-7). The trial court also charged the jury that under the Sherman Act a mere agreement in restraint of trade is an offense and that it is immaterial whether anything is done towards the carrying out or performance of such agreement; that the mere making of the agreement, although nothing is ever done towards its accomplishment is a violation of the law (R. p. 694, fols. 2081-2); that the power to control prices is condemned by the law (R. p. 699, fol. 2097). Upon exception being taken to these rulings the trial court reaffirmed the doctrine thus announced, stating that what he had charged the jury was that if they had determined that such a combination or conspiracy was entered into it was immaterial whether any effort was made to carry it out (R. pp. 722-3, fols. 2166-8). The court also charged the jury that the second count to the indictment charged a combination or conspiracy to confine sales to a class, stating that the confining of sales to a class was illegal (R. p. 703, fols. 2107-8).

ARGUMENT.

I.

The petition should be dismissed and the writ of certiorari denied for the following reasons:

This Court has no jurisdiction to grant a writ of certiorari to review a decision of the Circuit Court of Appeals in favor of the defendants in a criminal case.

As stated in Respondents' answer to the petition, this was held in *United States* v. *Dickinson,* 213 U. S. 92, under the Act of 1891, and the power of the court has not been enlarged in this respect by the Act of 1911. This point is mentioned here because of the reference in the Government's brief to the allowance of a writ in *United States* v. *Gulf Refining Co.,* 262 U. S. 738. That case arose under the Interstate Commerce Act, and its only similarity to the present case lies in the fact that in both cases a conviction under a criminal statute was reversed by the Circuit Court of Appeals. An application to dismiss the writ in *United States* v. *Gulf Refining Co.* has been noticed for the present term of this court. Under these circumstances the mere allowance of the writ is not a final adjudication that the court has jurisdiction to allow it, such writs, duly allowed, having been dismissed on this ground. *U. S.* v. *Dickinson, supra; U. S.* v. *Evans,* 213 U. S. 297.

II.

The judgment of the District Court was erroneous, and the judgment of the Circuit Court of Appeals reversing it was correct, for the following reasons:

1.

The Sherman Act prohibits only such combinations as produce an undue and unreasonable restraint of trade.

Any doubt as to the correctness of the proposition that the Sherman Act prohibits only undue and unreasonable restraint of trade was set at rest by the decisions in *Standard Oil* v. *United States,* 221 U. S. 1, and *United States* v. *American Tobacco Co.,* 221 U. S. 106. The rule has been frequently reaffirmed by this court. *United States* v. *U. S. Steel Corporation,* 251 U. S. 417; *Nash* v. *United States,* 229 U. S. 373; *Chicago Board of Trade* v. *United States,* 246 U. S. 231; *National Association of Window Glass Mfr'rs.* v. *United States,* 263 U. S. 403.

2.

The construction of the Sherman Act announced in the decisions above cited applies as well in a criminal case as in any other.

The trial court held throughout that the construction of the Sherman Act announced in the decisions above cited had no application to a criminal case and refused to add to the statement that the Sherman Act denounces a combination or conspiracy having for its object the interference of

interstate commerce, the qualification that it denounced only undue or unreasonable interference (R. p. 83, fols. 248-9), and finally stating flatly that the considerations announced in the *Standard Oil* and *Tobacco* cases had no application to a criminal case and could not be considered either by the jury *or by the court* (R. p. 665, fols. 1994-5).

The offense charged in the indictment was the doing of something prohibited by the Sherman Act. Surely the Circuit Court of Appeals did not err when it held that the prohibitions of the statute are the same whether the proceeding for the enforcement of the law is on the civil or the criminal side of the court, and that the law will not punish the commission of acts which it would refuse to enjoin.

3.

Whether the respondents were guilty of a combination or conspiracy in undue or unreasonable restraint of trade was for the jury.

The first point in the Government's brief is an argument that the question whether the respondents in such a case as this were guilty of producing an unreasonable restraint of trade should be excluded from the consideration of the jury.

This court has repeatedly held that only combinations in undue and unreasonable restraint of trade are prohibited. If this is so, it must necessarily follow that whether any combination which the respondents may have formed effected such a restraint, is a question which must be passed upon in determining whether or not they had violated the law. Even the Government does not go so far as to contend in its brief, as it did in its petition, that the

question of reasonableness is immaterial, but argues in effect that in certain cases the question of reasonableness is one which the court can determine as a matter of law. But it has been expressly held that whether a restraint is reasonable or otherwise is a question of fact (*United States* v. *U. S. Steel Corp.*, 223 Fed. 55, at pp. 61 and 78 (affirmed 251 U. S. 417)), and that the fact that the statute required it to be submitted to a jury did not render it unconstitutional. *Nash* v. *United States*, 229 U. S. 373, at pages 376-8. Even if this contention were correct the judgment of the District Court was wrong and the judgment of the Circuit Court of Appeals reversing it was right, for the trial court did not consider the question of reasonableness as a question of law, but ruled explicitly, not only that it could not be considered by the jury, but also that it could not be considered by the court (R. p. 665, fol. 1995).

The statement in the Government's brief that mere power is a violation of the Sherman Act is contrary to the holding of this court in *United States* v. *U. S. Steel Corp.*, 251 U. S. 417, where it is said, at page 451: "The law does not make mere size an offense, or the existence of unexerted power an offense". In all of the cases cited by the Government there was more than the naked possession of power; in all of them it was found either that the power had been exercised in a manner and to an extent which unreasonably restrained the freedom of commerce, or that the terms of the actual agreemen proved were such that an intent to restrain trade to an unreasonable degree must be presumed.

The Circuit Court of Appeals did not hold, as stated in the Government's brief, that the agreement may be reasonable unless the public is injured.

The Circuit Court of Appeals did hold that the essence of the law is injury to the public and that it is not every restraint of competition and not every restraint of trade that works injury to the public; it is only an undue and unreasonable restraint of trade that has such an effect and is deemed to be unlawful. This holding is entirely in accord with the construction placed upon the Sherman Act by this court in the *Standard Oil* case; see 221 U. S. at page 78.

The Government's contention that a price fixing agreement cannot possibly be reasonable is sufficiently contradicted by the decisions of this court in *Chicago Board of Trade* v. *United States,* 246 U. S. 231, and *National Association of Window Glass Mfrs.* v. *United States,* 263 U. S. 403, see also opinion of Judge Woolley in *United States* v. *U. S. Steel Corp.,* 223 Fed. 55, at page 173. As to the legality of a price fixing arrangement during an abnoral period.

The prejudicial effect of the exclusion of the question of reason can be better appreciated if it is borne in mind that the government placed great weight upon one specific instance of price fixing, which was a recommendation of a price reduction at the conclusion of the war (Govt. Ex. 97, R., pp. 884-9). That activities which under normal circumstances might be subject to criticism are quite reasonable under the extraordinary circumstances following the conclusion of the war (see *Fosburgh* v. *California & Hawaiian Sugar Refining Co.,* 291 Fed. 29, at pp. 35-6).

The respondents do not rely upon decisions of inferior courts holding the Lever Act constitutional. They do rely upon decisions of this court in *Nash* v. *United States,* 229 U. S. 373, to the effect that the

Sherman Act is constitutional, although it requires the submission of the question whether or not the respondents were guilty of effecting an undue or unreasonable restraint of trade to the jury. In that case the same argument now made by the Government that submission of the question whether defendants were guilty of an undue and unreasonable restraint of trade to a jury made liability in a criminal case speculative was advanced and expressly overruled. The respondents are at a loss to understand how the fact that in *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, the court declared a Kentucky statute unconstitutional can have any effect upon the construction of the Sherman Act announced in the *Nash* case.

4.

In this case the jurisdiction of the trial court depended on the commission of overt acts in the Southern District of New York and to exclude from the consideration of the jury the question whether overt acts had been committed in that District or elsewhere, was error which required the Circuit Court of Appeals to reverse the judgment of the District Court.

The trial court charged the jury that "A mere agreement on the part of members of a combination in restraint of trade constitutes an offense and it is immaterial whether anything is done by the combination, its members or its agents towards the carrying out or the performance of such an agreement. The mere making of the agreement, though nothing is ever done towards its accomplishment is in itself a violation of the law" (R. p. 694, fols. 2081-2), and again: "The agreement itself is a vio-

lation, even though nothing is ever done towards carrying it out" (R. p. 695, fol. 2083). Upon exception being taken to these portions of the charge the court reaffirmed them, stating: "What I charge the jury is that after they have determined that such a combination or conspiracy has been entered into, then it is immaterial whether any effort was made to carry it out", to which exception was duly taken (R. p. 723, fols. 2167-8).

It is perfectly apparent that these instructions would have justified the jury in convicting the respondents in the Southern District of New York without finding that they had committed any overt acts in that District.

The treatment of this phase of the case in the Government's brief is remarkable. It makes the statement on page 6 that in this case the officers of the respondent corporations called as witnesses by the Government testified to the commission of overt acts in the Southern District of New York and that witnesses called by the respondents testified to the same facts. The same statement is made on page 8. These statements are unwarranted. The Government does not state what overt acts were committed, or what witnesses testified to them, or where in the record such testimony can be found. The respondents did not, as stated in the Government's brief, admit in any way the commission of any overt acts in the Southern District of New York or anywhere else, and throughout the case denied both the existence of any conspiracy and the commission of any overt acts.

The Government's contention that there had never been any disagreement as to the propriety of the charge of the court is without merit. The Government's argument that the respondents are main-

taining that they had in effect requested a charge on venue is likewise without merit. The respondents contend nothing of the sort. They never requested any charge on venue. Under the indictment the venue was properly laid. The respondents did, however, except to an erroneous charge delivered by the trial court to the jury (R. p. 723, fol. 2168). The Government now argues that they cannot take any benefit from this exception because they did not expressly request a correct charge. The argument is not well founded. The defendant in a criminal case is under no obligation to make any request to the trial court for charges, and the fact that they do not do so does not prevent them from taking exception to any erroneous statements of law contained in the charge actually delivered by the court.

5.

The trial court excluded competent evidence on the subject of competition.

The respondents at the trial called a dozen or more witnesses, all of whom had purchased large quantities of pottery from them, to testify that there was active competition between the several respondents. The points in the record at which such testimony was offered and excluded are referred to above (*ante*, p. 3). All of these witnesses were persons of long experience as dealers in the commodities in question. Competition is a fact. All of them knew what it was. Testimony of this character cannot be properly excluded on the ground that it is opinion evidence.

6.

The activities of Mr. Hanley were not a proper subject for the consideration of the jury.

This is discussed in Point IV of the Government's brief on pages 10 and 11 thereof. The first paragraph under this point consists entirely of statements having no foundation at all in the record in this case and of which counsel for the respondents had no knowledge until the Government's brief was served upon them. The fallacy of the Government's argument is that there is nothing in the record to show that the examination of Mr. Hanley by the Lockwood Committee had anything to do with the exportation of Class B goods or that any of the respondents knew that Mr. Hanley had been so examined. In the absence of such a showing the fact that he was examined could of course be no explanation of any act of the respondents, and to allow it to be shown was prejudicial error.

7.

The fact that the J. L. Mott Iron Works had pleaded guilty to a violation of the Sherman Act was not admitted to show the bias of the witness Bantje, but as a circumstance affecting his credibility.

The Government does not contend in its brief that this circumstance could be shown to affect the credibility of the witness Bantje, but argues that it was permissible to show bias on his part. The Government expressly stated on page 13 of its brief that "It was proper for the Government to indicate that fact, *not as a means to impeach the witness' credibility*, but in order to show his possible bias against

the Government." (Italics ours.) The trouble with this argument is that the circumstance was admitted, not for the purpose of showing the bias of the witness, but *expressly for the purpose of affecting the credibility of the witness,* the court saying (R. p. 456, fol. 1368): "It is simply a question going to the *character and credibility of a witness,* and is laid before the jury for the purpose of enabling them to judge intelligibly what *degree of credibility they should accord to a witness.*" (Italics ours.)

8.

The judgment of the trial court was properly reversed because of the denial of the respondents' requests to charge numbers 22-31, both inclusive.

These requests are set forth on pages 672 to 675 of the record. They were expressly denied by the court (R. p. 727, fols. 2180-1), to which refusal an exception was duly noted (R. p. 721, fol. 2185). All of these charges embodied propositions of law announced by this court in *Standard Oil* v. *United States,* 221 U. S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 106; *Nash* v. *United States,* 229 U. S. 373, and other cases. The twenty-fifth request (R. p. 673, fol. 2019; 674, fol. 2020) was in the very language of this court in *Chicago Board of Trade* v. *United States,* 246 U. S. 231.

III.

If this court finds that the judgment of the Circuit Court of Appeals was correct, such judgment should be affirmed without regard to the reasons given by that court for its judgment.

This point is covered on pages 9 and 10 of the Respondents' answer, and to that we refer.

Respectfully submitted,

R. V. LINDABURY,
Attorney for Respondents.

R. V. LINDABURY,
EDWARD L. KATZENBACH,
H. SNOWDEN MARSHALL,
Of Counsel.

N1633

IN THE

Supreme Court of the United States.

No. 27.

OCTOBER TERM, 1926.

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

THE TRENTON POTTERIES COMPANY, *et als.*,
Respondents.

ON CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

CHARLES E. HUGHES,
GEORGE WHARTON PEPPER,
EDWARD L. KATZENBACH,
GEORGE H. CALVERT,
JOHN W. BISHOP, Jr.,
H. SNOWDEN MARSHALL,
Of Counsel.

The Evening Post Job Printing Office, Inc., 134 Fulton St., New York, N. Y.

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United States Supreme Court.

OCTOBER TERM, 1926.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

THE TRENTON POTTERIES COMPANY,
et als.,
Respondents.

No. 27.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS.

Statement of the Case.

The statement of the case contained in the Petitioner's brief is so inadequate as not to give any clear statement of the respondents' activities, or the particulars of the offense charged against them. The respondents therefore submit the following statement in which is contained facts which the jury would have been warranted in finding from the evidence, had they been properly instructed.

General Theory of Prosecution.

The general theory of this prosecution was that a conspiracy to maintain prices, and to deal solely with a special group of jobbers, had originated somewhere—certainly not in the State of New York or the Southern District of New York, and at some time—certainly not within the Statute of Limi-

tations. The indictment was apparently framed with a view to avoiding the bar of the Statute of Limitations, under the doctrine of the case of *U. S.* v. *Kissel*, 218 U. S. 601, and to conferring jurisdiction on the District Court for the Southern District of New York, under the doctrine of *Hyde* v. *U. S.*, 225 U. S. 347.

While the indictment is silent both as to the time and place of the origin of the alleged conspiracy, it may be inferred from the evidence that the Government's theory is that the conspiracy originated in point of time, perhaps, about December, 1918, and that the place where the conspiracy originated was, perhaps, Pittsburgh, Pa.

The indictment, for the purpose of showing jurisdiction to try this conspiracy, for which no date or place was named, alleged as to each count thereof in virtually the same language:

> "That heretofore and within the period of three years next preceding the finding of this indictment, the above described combination and conspiracy among said defendants was by said defendants extended, renewed and carried out within the Southern District of New York, in that in pursuance of said combination and conspiracy the said defendants did" * * * various alleged overt acts within the Southern District of New York. (R., pp. 9-10, fols. 27-28, for language of First Count; R., p. 13, fols. 37-38, for language of Second Count.)

The issue presented by the indictment and the defendants' plea of not guilty is simple. The charge is that the defendants *did* in fact maintain arbitrary, uniform and non-competitive prices (R., p. 9, fols. 25-27), and *did* in fact limit their sales to a "special group" selected by themselves known as legitimate jobbers (R., p. 12, fols. 34-36). These two things are stated to have occurred at times within the Statute of Limitations, and places within the jurisdiction of the court; and are brought under the condemnation of the Sherman Act by allegations that the acts were respectively the result of a combination and conspiracy entered into at some unnamed time and place, to perform the alleged acts.

The Material Facts.

It was not contended on the trial, and is not contended ow, that the defendants ever charged excessive prices, or ver did anything to injure the public. On the contrary, by vidence introduced on the part of the Government, it ap- eared that the industry, for a number of years, had not been rofitable (Gov. Ex. 122, R., Vol. II. top of p. 923). We think re are safe in saying that this is the first case under the herman Act where defendants have been convicted and sen- enced to prison for the mere possession of an unused power o raise the price if they chose to (R., p. 699, fol. 2095; Ex- eption, R., p. 724, fol. 2170).

The period of three years next preceding the indictment xtended from August 8, 1919, to August 8, 1922, the date f the indictment. The evidence, however, goes back as ar as the latter part of 1916. All of the corporate defend- nts but one were members of an organization known as the anitary Potters' Association (hereinafter referred to as the ssociation) during the entire period covered by the evi- lence; the remaining member did not join until the latter part f the period (R., p. 21, fol. 63; p. 533, fol. 1598). The indi- idual defendants were all officers or employees of corporate lefendants, and from time to time attended meetings of the ssociation, all of which appear to have been held either at ittsburgh or Shawnee, Pa., or Atlantic City, as did also repre- entatives of corporate members not indicted, and guests who ad no connection at all with the association (Govt.'s Exs. 26 and 227, R., pp. 1120-1). Certain of the individual de- endants acted as officers of the association and served on its arious committees.

The association was organized informally without any onstitution or by-laws long before the period covered by the ndictment (R., p. 22, fol. 65; p. 332, fol. 998). Originally ts principal if not its only activities were concerned with labor matters, particularly the relations between its members and a labor union known as the National Brotherhood of

Operative Potters, in which were enrolled the great majority of the workmen employed by the defendants (R., p. 173, fol. 518; pp. 332-3, fols. 996-8; p. 340, fol. 1018). By the beginning of 1917, however, it had engaged in numerous other activities, none of which were shown or contended to have been unlawful.

At one time or another, it dealt with cost accounting systems, advertising, methods of manufacture, technical difficulties and their remedies, conducted discussions as to such subjects at its meetings (R., p. 333, fol. 998), and at times procured lecturers on scientific subjects to address its members (R., p. 174, fol. 522). It took steps to secure accurate information as to customers, considered trade practices, took up the subject of standardizing products and eliminating obsolete models (R., p. 174, fol. 522), and endeavored to work out rules and regulations to protect the health of the workmen (R., p. 176, fol. 526). It recommended the adoption of uniform terms of credit (Govt.'s Exs. 21, 22, 26; R., pp. 779-780, 787) which were adopted by some of its members, while others made different terms (Govt.'s Exs. 265, 266, 270, 105; R., pp. 1173, 1221, 1466, 898; p. 437, fols. 1309-1311). It considered other trade practices, such as discounts for orders in quantity (Govt.'s Ex. 105; R., p. 898); an extra charge for shipments elsewhere than to the buyer's place of business; and allowance for freight (Govt.'s Ex. 119, R., p. 920); and an extra charge for new moulds, or changes from standard models (Govt.'s Ex. 85; R., p. 867). A recommendation of the first of these practices aroused some opposition (Govt.'s Exs. 106, 107, 108; R., pp. 902, 904, 906), and none of them appear to have been actually followed by the members.

From 1918 to 1920 some of the members, pursuant to a resolution adopted at a meeting of the association at Pittsburgh in 1918, sent to its Secretary reports of the number of pieces of certain kinds of ware ordered from them, the zone from which the order came, and the price. The making of these reports was entirely optional with the members. From

the reports the Secretary prepared tabulations which he sent to the members reporting, first destroying their original reports in order to prevent the possibility of one member getting information as to the business of any other. The tabulations of the Secretary did not show either the names of the members reporting or of purchasers. The members did not all report except on three occasions. Less than one-third of the tabulations show over 90% as reporting, and approximately one-half show under 80%. These tabulations contained no recommendation as to curtailments of production, or the pursuance of any particular policy as to prices or otherwise (Govt.'s Exs. 12 and 137; R., pp. 743, 944). The percentages of kilns reporting were sometimes over-stated by the Secretary (R., p. 654, fol. 1962; Govt.'s Ex. 137, R., p. 1028, fols. 3082-3084), and at times sales at low prices were omitted (Defts.' Exs. D-286 and 287; R., pp. 2970, 2971). The inclusion of prices in these reports was discontinued in July, 1920, the reports and tabulations thereafter showing only quantities sold, without prices. The tabulations from 1918 to July, 1920, are all in evidence (Govt.'s Exs. 12 and 137, R., pp. 12, 137), and show wide variations in prices.

The defendants pursued the practice common to most large industries involving trade in a great number of different articles, of circulating a printed base price list among their customers (R., p. 349, fols. 1046-7; p. 470, fols. 1410-1; p. 476, fol. 1426). This practice, as is well known, is for the purpose of making more convenient the issuing of quotations of prices from time to time, by adding or subtracting figures from the base price list in which the standard articles have a so-called base price. This relieves the manufacturer of the necessity of reprinting from time to time a voluminous catalogue of his articles as prices vary. The prices appearing in the so-called base price list were admittedly not intended to be selling prices.

The statements on pages 4 and 5 of the Government's brief would tend to create an erroneous impression as to these base price lists. At this point of the brief it is stated that one list

was adopted in March, 1917, and another in May, 1919, which latter had been prepared by a revision committee, appointed at the meeting in Pittsburgh, called directly after the war and which was still "in force". The references given in the brief indicate that the base price lists here alluded to are Government's Exhibits 19 and 20. The way in which the brief is worded would tend to create the erroneous impression that these base price lists were lists of prices to be charged for output; whereas, as a matter of fact, it was undisputed at the trial that this was not the case. The use to which the base price lists were put clearly appears from the uncontradicted testimony of the witness Faherty, who testified as follows (R., p. 362, fol. 1085):

> "Every article that I manufacture has a list price. I meant something such as Government's Exhibits 19 and 20.
>
> "Q. You did not have in mind, did you, that these list prices, or these books of prices here, were intended to be prices that were to be charged for anything? A. No, sir."

And again (R., p. 349):

> "There is a difference between prices and list prices. I did not know that what you wanted to know is not merely the list price but what was being charged. * * * The list is the basis of our actual charge. We begin with the list and then we figure the discounts. We have to begin with the list and figure the discount. * * * I would say that our discount as announced in our bulletins has been different from the others."

Bulletins were issued from time to time, stating the discounts or surcharges to be subtracted from or added to the base list. The evidence did not show any explicit agreement as to the price bulletins or discount sheets by which the discounts used in determining the actual sale prices were announced, and that there was any such agreement was denied by a number of the witnesses (R., p. 325, fols. 974-975; p. 340, fol. 1020; p. 341, fol. 1022; p. 342, fol. 1024; p. 343, fol.

1027; p. 364, fol. 1092; p. 534, fol. 1602; p. 342, fol. 1044; p. 348, fol. 1150).

There were only four instances directly shown of activity by the Association with respect to prices charged by its members for their output:

1. During the war there had been an agreement between the Quartermaster's Department of the United States Army and the members of the Association as to the prices at which Government orders should be put (R., p. 487, fol. 1461). The nature of this agreement is set forth in a letter admitted by stipulation (R., p. 489; defendants' exhibit D-173). From this letter it appears that fixed prices for sales to the Government had been determined upon, and an agreement to sell to the Government at these prices was recommended to all members of the association by its President, in a circular letter sent around to all of its members (R., p. 489). As the war advanced and prices were raised, these prices were slightly increased by agreement. Inasmuch as the Government was the largest single purchaser of the commodities sold by the members of the association during the erection of its cantonments during the war, the price agreed upon with the Government had a natural tendency to produce uniformity in the prices charged to other customers who dealt with the defendants.

2. At a meeting in Pittsburgh, Pa., about December 17, 1918 (the first meeting after the Armistice), the association debated the question of bringing about a reduction of prices. The President of the association made an address and presented a memorandum and a blueprint (R., p. 179; Government's Exhibits 93 and 97; R., volume II, p. 884). In this circular the many reasons for reducing prices were pointed out. Allusion was made to public statements that there should be an immediate adjustment of prices to stimulate buying (R., Volume II, p. 885); allusion was made to the advisability of this association doing its part to help architects and builders convince prospective builders that the much talked of reduc-

tion in prices had taken place, so as to start proposed operations (R., Volume II, p. 886). The manufacturers were advised to bulletin the trade with revised prices which "should be as low as is consistent with good business, so that future reductions will not be necessary" (R., Volume II, p. 884), and it was pointed out (R., Volume II, p. 884) that "the present extraordinary conditions necessitate extraordinary measures".

It is common knowledge that this action on the part of this association was similar to action taken in many other trades at the same time and that many public men and economists were urging all trades to get prices down from the war level and stimulate the normal resumption of business.

3. In 1919 the John Douglas Company, a member of the association, began underselling its neighbors, the Abingdon Sanitary Mfg. Company and the National-Helfrich Potteries Company. It was the contention (R., p. 1148, 1151) of the two last named companies that the John Douglas Company had cut prices below its cost of production (R., pp. 1141-1170). Representatives of the two last named companies called the matter to the attention of the Secretary of the association, who, in turn, communicated with John Douglas and with the Executive Committee. Mr. Douglas promptly informed the Secretary that the matter was "none of the executive committee's damn business" (R., p. 291, fols. 872, 875; Govt.'s Ex. 251, p. 1154). Representatives of the other two companies visited Mr. Douglas and contended that he was selling below cost. After talking with them he raised his prices (Govt.'s Ex. 150, R., p. 1079), and stated that he was always willing to compare cost of production (R., Vol. II, p. 1170). The new prices were not shown to be uniform with those of the other companies and were not in excess of a reasonable figure (Govt.'s Ex. 260, R., p. 1164). The gentlemen who visited Mr. Douglas advised the association of their visit and its result (Govt.'s Exs. 257, 260, R., pp. 1161, 1164).

4. A salesman acting for the Horton Pottery Company at one time took orders at prices below its cost of production. The low price quoted caused comment, and upon inquiry by Mr. A. M. Maddock, President of the association, Mr. Horton advised him that it had been a mistake (R., pp. 535-6, fols. 1604-6).

In these two instances, the effort on the part of some of the defendants to bring about a raise of prices was manifestly dictated by a desire to prevent the starting of a trade war, and it was the contention of the defendants, advanced in their requests to charge, which were refused by the court, that it was entirely reasonable for the other people in the business to remonstrate with a competitor who was selling below his cost of production (R., pp. 681-2; Requests to charge Nos. 48, 49, 50).

A certain proportion of the output of sanitary pottery was slightly defective, the defects not interfering with its utility. Such ware was known as class "B" (R., p. 47, fol. 139). It was not produced intentionally, but was an accident of manufacture. Successful plants produced very little of it (R., pp. 463, 534, fols. 1387, 1600-1). The sale in the domestic market of the first-class product and also of the second-class product furnished opportunities for fraud by dishonest plumbers and dishonest jobbers, and it was the contention of the defendants (R., p. 154) that it was the desire to prevent these frauds that was the reason for advocating the exporting of the second-class products. While the association recommended the export of this class of ware, such policy was never to any great extent followed by the members. On one occasion a poll of twenty-four companies showed twenty selling class "B" ware in the domestic market. The association appointed a committee to confer with the jobbers' association with a view to stopping the practice (Govt.'s Ex. 148, R., p. 1077). The Committee never appears to have done anything, and no further action seems to have been taken. Class "B" ware was sold in the

domestic market by most of the corporate defendants (R., p. 380, fols. 1140-1; p. 434, fols. 1301-2; p. 447, fols. 1340-1342; p. 496, fol. 1486; p. 465, fol. 1395; p. 469, fol. 1407; p. 441, fol. 1321; pp. 524-5, fols. 1572-4; p. 465, fol. 1357; p. 365, fol. 1094; p. 438, fols. 1313-14), such sales being so frequent as to cause complaint from manufacturers who advocated the policy of exporting it (Govt.'s Exs. Nos. 27, 28, 29, 31, 64-69, pp. 788, 790, 792, 794, 834, *et seq.*), and from a jobbers' association (Govt.'s Ex. 148, R., p. 534). One company never exported any (R., p. 534, fol. 1601). The remonstrance on the part of the Jobbers' Association could certainly not have been dictated by any desire to aid the defendants in restraining trade or maintaining prices, which the jobbers themselves had to pay, and must obviously have been based on the danger to them of the frauds rendered possible by the sale of the two classes of goods at the same time, in the same market.

With the exception of the Horton Pottery Company all of the corporate defendants from time to time issued to the trade bulletins showing either the discounts they would make from the base price list or the prices at which they would sell or both. There is nothing to show when this practice commenced. It was followed in 1917 (Govt.'s Exs. 265, R., p. 1175, fol. 272; p. 1583; Defts.' Ex. D-174, p. 2901; Ex. D-175, p. 2970). Frequently a number of the defendants' bulletins bore the same dates and announced the same prices. They were not, however, always issued on the dates they bore. When the smaller plants received bulletins from the larger they issued similar bulletins antedating them to correspond to those of the larger concerns (R., p. 342, fol. 1024; p. 384, fol. 1150).

During all of the period in question sales of sanitary pottery were made at prices below those announced in the current bulletins (R., p. 344, fols. 1030-1031; p. 375, fol. 1123; p. 397, fols. 1189-1191; p. 422; fol. 1264; p. 442, fols. 1324-1325; p. 445, fol. 1335; p. 459, fol. 1375; p. 459, fol. 1376; p. 460, fol. 1378; p. 498, fol. 1493; p. 512, fol. 1535; p. 516, fol. 1547 and p. 521, fol. 1562). Some buyers never paid the

bulletin prices (R., p. 424, fol. 1271). Others bought oftener below than at the bulletin prices (R., p. 448, fol. 1342; p. 452, fol. 1356; p. 459, fol. 1375; p. 459, fol. 1376; p. 460, fol. 1378; p. 464, fol. 1391). The prices at which the various companies actually sold were usually different (R., p. 528, fol. 1582). Sometimes the bulletin prices varied (R., p. 450, fol. 1348; p. 459, fol. 1376). The prices charged by some of the companies were always lower than those of any of the others (R., p. 381, fol. 1142). Some manufacturers regularly gave certain customers a stated reduction from their published prices (R., p. 513, fol. 1539). Salesmen of defendant companies found themselves in competition as to price with those of other companies (R., p. 398, fols. 1193-1194), and manufacturers, if they wanted the business, met their competitor's prices (R., p. 471, fol. 1412). Buyers found manufacturers bidding against each other for their business (R., p. 422, fols. 1265-1266; p. 492, fol. 1475; p. 514, fol. 1541; p. 525, fols. 1573-1575) and reducing their prices to get orders (R., p. 439, fol. 1317; p. 446, fol. 1336; p. 450, fol. 1349). Some buyers obtained prices from several manufacturers at the same time and found that these prices differed (R., p. 436, fol. 1306; p. 438, fol. 1314; p. 440, fols. 1318-19; p. 446, fol. 1336; p. 465, fol. 1393; p. 528, fol. 1582). Some of the buyers thought so little of the price bulletins that they threw them away (R., p. 439, fol. 1316).

An analysis of the records of sales by twenty-one of the several corporate defendants of standard tanks and bowls from June 1, 1918, to July 31, 1922, shows 26% of the tanks sold at bulletin prices, 64% sold below, and 10% above, while 28% of the bowls were sold at the bulletin prices, 68% below, and 4% above (R., pp. 566-7, fols. 1698-1700; Defts.' Charts, Exs. D-228 and D-229). Similar analysis of particular bulletins during the same period showed the greater part of the sales at prices below those announced in the bulletins (R., pp. 558-567, fols. 1674-1701; Defts.' Charts, Exs. D-210 and D-227). This analysis was based upon the tabulations referred to on page 43 of the Government's brief as having been admitted in evidence by stipulation.

The adoption of resolutions by the Association did not affect the conduct of members who disapproved of them (R., p. 335, fol. 1004).

The majority of the members of the Association distributed their wares through jobbers and confined their sales to this class of dealers. Some of them had adopted this policy many years ago (R., p. 326, fol. 977; p. 340, fols. 1019-1020). Although it is referred to by the Secretary as the settled policy of the Association (R., p. 68, fols. 203-204, Govt.'s Ex. No. 62, p. 832), the National-Helfrich Potteries Co. and the John Douglas Co. never adopted it, but sold principally, if not entirely, to plumbers (R., p. 291, fol. 873; p. 506, fol. 1517, Govt.'s Exs. No. 246, p. 1149, fol. 3445, No. 250, p. 1153, fol. 3459). The Abingdon Sanitary Mfg. Co. sold to plumbers (fol. 1517), the Kalamazoo Sanitary Mfg. Co., the Camden Pottery Co. and the Universal Pottery Co. sold to retailers not engaged exclusively in the jobbing business (R., p. 465, fol. 1395). The Acme Sanitary Pottery Co. at times sold to retailers (R., p. 379, fol. 1137), as did the Resolute Pottery Co. (R., pp. 364-5, fols. 1092-93). The Lambertville Pottery Co. originally adopted the policy of selling to jobbers, but for a time abandoned it and sold to retail plumbers. This manner of distribution was not profitable and it returned to the policy of selling through jobbers (R., p. 340, fols. 1019-1020). It adopted the policy of selling through jobbers before joining the Association (R., p. 345, fol. 1033).

The Secretary of the Association kept a mailing list of jobbers (R., p. 59, fol. 177), containing only the names of concerns actually doing a jobbing business, and not installing plumbing (R., p. 61-2, fols. 183-186), and from time to time he answered inquiries from companies whose policy was to distribute their products through jobbers.

The method of manufacture of the product of the defendants was shown at length (R., p. 320, fol. 960 *et seq.*). The materials entering into the product of each of the manufacturers and the method of manufacturing were substantially the same (R., p. 330, fols. 989, 990), and the cost

of labor amounted to about seventy per cent. of the cost of production (R., p. 340, fol. 1020). The great majority of the workmen employed by the corporate defendants were members of a single labor union, the National Brotherhood of Operative Potters (R., p. 173, fol. 518; p. 340, fol. 1018). Consequently, it followed necessarily—as the output consisted of standardized articles, and the articles and labor going into manufacture were substantially identical,—that the cost of production was substantially uniform.

From the foregoing statement it would appear that, on the main issues presented by the indictment, the evidence may be classified as follows:

(a)

As to uniformity of prices at which sales were made.

(1) The reports of sales prices by the Secretary (*ante*, pp. 4, 5). The value of these reports was somewhat impaired by the fact that there were nine concerns which were not indicted, but which were members of the association, which might or might not have joined in making the reports from which these tabulations were prepared. Their value was further affected by proof that in at least one instance the Secretary deliberately suppressed a report of a sale at a very low price. Nevertheless, these tabulations (Government's Exhibits 12 and 137; R., pp. 743, 944) indicated a wide spread of prices; and perhaps the most significant thing about them was that, as to each article about which the reports were sent out, each report contained a statement of what the high price was, what the general average was, and what the low price was during the period reported, *e. g.* Secretary's report of February 28, 1919 (R., p. 951), where it appears (R., p. 953) that the prices of the standard articles varied as follows: Syphon jets $10.50 to $18.65; Washdown bowls $7.25 to $9.35; Reverse traps $8.25 to $9.07; small tanks $11.90 to $13.43; large tanks $14.28 to $15.58. See also pages 956, 959, 962, 966, etc. During the period when these reports were sent out, therefore, it was known, to all members making

reports of their sales, and receiving the tabulations of the Secretary, that there was no uniform price charged; and for this period of eighteen months, from December, 1918, to July, 1920, it was common knowledge among the defendants who received these reports of the Secretary that, if there was any agreement as to uniformity of price, this agreement was habitually disregarded.

(2) The testimony of purchasers. The witnesses, who bought the output of the defendants, were unanimous in their testimony, so far as they were allowed to testify, that during the whole period covered by the indictment, the defendants were in active competition as to prices at which sales were made (*ante,* pp. 10, 11).

(3) The tabulations prepared to indicate the actual sale prices of the defendants, and the charts showing these figures. These charts (Defendants' Exhibits D-176—D-285) speak for themselves, and tell about the same story as was told by the purchasers, namely: that through the whole period covered in the indictment, the defendants were in active competition as to the prices at which sales were made.

(b)

As to uniformity of prices asked, or "bulletin" prices.

The method, adopted by most of the defendants, of notifying the purchasers with whom they marketed their product of their asking prices, and of changes in these asking prices, was by issuing printed "bulletins" of prices. These bulletins would remain extant until a change took place in the asking price, either upwards or downwards, when a new bulletin would be issued. There was necessarily a considerable degree of uniformity in the bulletins of different defendants extant at any one time. Obviously, if bulletins were issued by some of the defendants reducing prices, other defendants would be forced, whether they liked it or not, to meet the reductions, or be in the position of being underbid in the market. Equally obviously, where economic conditions made it practical for

some of the defendants to raise asking prices, the others would naturally follow the lead, induced by the hope of getting the higher prices, and the fear of being caught in a rising market with a lot of orders at low prices if they did not follow the lead and raise their bulletin prices (R. pp. 341, 342). It requires no assumption of a conspiracy or combination to account for uniformity in bulletin prices, as there necessarily would have been such uniformity if no one defendant had ever seen or communicated with any other one, but if each had learned from his salesmen of changes in the bids of competitors.

(c)

As to margin of profit over costs.

As the government did not contend at the trial that either the prices asked or the prices received by the defendants were unfair or exorbitant, the case was left barren of the proof, ordinarily found in a Sherman Act prosecution, indicating the difference between the cost of production and the price realized by sale. There is, however, one incident in the record which throws some light on this important matter of fact. When the Douglas Company cut their prices to what was claimed by their neighboring competitors to be a price below the cost of production, they advertised and offered a combination article at $22.00 per article (R., pp. 1148, 1151). This figure, so their neighbors claimed, brought sales price below cost of production. When the Douglas Company, after the remonstrance of its neighbors, and after analyzing the cost of production, agreed to raise the price, they raised the price of this article to $24.50 per article (R., p. 1163). This change was apparently entirely satisfactory and obviated the complaint that sales were being made below cost. From this incident it would appear that the difference between cost price and sales price was 10% or less of the cost of production.

(d)

As to dealing with jobbers.

There is absolutely no evidence of any contract or combination restricting the liberty of action of any of the defendants as to whether they should or should not deal with jobbers and a number of the defendant Companies did not confine their sales to jobbers (*ante*, p. 12). The utmost extent to which the evidence on this subject goes is that it was the general policy of most members of the association to deal with jobbers. That is to say, there was about the same evidence along this line, as the court will, we think, take judicial notice, as could be obtained against almost any other group of manufacturers. In this case, the government retired from the position that it was necessary to find a combination or agreement to deal with a special group of jobbers, and went to the jury on a charge that it was sufficient, for a conviction, if the defendants assented to a general policy to deal with jobbers as a class.

* * * * * * *

In the Government's brief (p. 7) it is stated:

> "The defense was directed to proving that defendants did not adhere to the uniform prices and terms *agreed upon*, but that competition between them continued to exist in fact."

The words which we have italicized above do not correctly describe the position taken below by the defendants. It was never conceded that any bulletin prices or any terms or charges had been agreed upon, although it was conceded that they had a natural tendency to gravitate to uniformity. To illustrate this, we quote from the testimony of one of the defendants, who was describing the method he used in determining his prices. He said (R., pp. 341-342):

> "I was influenced by the prices fixed by other people in our line of work. I couldn't naturally expect to get more for my goods than most of my competitors.

"The people that sold the same sort of products that we had that were in our neighborhood were the Trenton Potteries Co., Thomas Maddock's Sons Co. I considered the market prices made by Trenton Potteries, Standard Sanitary, Thomas Maddock's and the larger plants as a rule.

* * * * * *

"Those are the three biggest potteries in our trade neighborhood, and I couldn't expect to get more than they did. If I learned of a price that they put out in a bulletin or anything, I would get out a bulletin just as quick as I could, to keep my plant from being flooded with cheap business. That is, if they put out a bulletin with a raise in price, I would put up my price just as quickly as I could, and I would date it back to their date, as far as possible, to protect myself on incoming orders, if I didn't want to accept them."

ARGUMENT.

I.

The trial of this case was permeated by an erroneous legal principle.

From opinion below:

> **"The second of the above facts raises the main point in the case, a matter urged throughout the trial, and most frankly met by the presiding judge.**
>
> **"Defendants insisted in various forms that inasmuch as they were indicted under the Sherman Act they could not be convicted thereunder unless what they had done amounted to an unreasonable or undue restraint of trade in interstate commerce (Standard Oil Co. v. United States, 221 U. S., 1; 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D, 734; United States v. Am. Tobacco Co., 221 U. S., 106, 31 Sup. Ct. 632, 55 L. Ed. 663). But the court ruled "that the ideas suggested by the Supreme Court in the Standard Oil and Tobacco cases * * * applied to actions of that character (i. e., the character of the Oil and Tobacco cases), which were bills in equity," and he held that said ideas "have (no application) here unless we are to construe this (Sherman) act in a way that would render it as obnoxious to the constitution and as incapable of enforcement" as the so-called Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, Sec. 3115, ⅛ E, et seq.), considered in United States v. Cohen, &c., Co., 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045). The matter was finally presented by the following request to charge:**
>
> > **'The essence of the law is injury to the public; it is not every restraint of competition and not every restraint of trade that works an injury to the public; it is only an undue and unreasonable restraint of trade that has such an effect and is deemed to be unlawful.'**

"Which request was refused in toto. In this we think the learned court erred, and in a manner that went to the foundation of the prosecution. Whether the government brings a suit in equity to obtain injunctive relief or a private person sues at law for triple damages, or a grand jury finds an indictment for conspiracy, such proceedings and all of them, if brought under the Sherman Act, must necessarily charge and prove a violation of that statute. The statute cannot mean one thing on the criminal side of the court and another on the civil side.

"In the well-known cases relied on by defendants the court was not defining a civil injury; it was defining the phrase 'in restraint of trade'. That is a very old phrase of the law; it became a term of art generations before the Sherman Act was enacted, and the cases cited are full authority for the proposition that when that phrase was used by the Congress in this statute it meant the same kind of restraint of trade that the law had known for generations, to wit, undue and unreasonable restraint. And when the highest court assigned this meaning to the phrase, that meaning applies, however and wherever the statute is invoked.

"The point is not without authority, if any were needed. In Nash v. United States (229 U. S., 373, 33 Sup. Ct. 780, 57 L. Ed. 1232), a demurer was lodged to an indictment under the Sherman Law on the ground "that the statute was so vague as to be inoperative on its criminal side" (p. 376, 33 Sup. Ct. 781), and this objection to the 'criminal operation of the statute', was thought to be warranted by the Standard Oil and Tobacco cases (supra). But Holmes, J., for the court, speaking in a criminal case, declared that the cases last referred to 'may be taken to have established that only such contracts and combinations are within the act as by reason of intent or the inherent nature of the contemplated acts prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade'. This is a direct holding, binding upon this court, to the effect that the construction of the statute or the accepted definition of its essential phrase, applies on the criminal side as well as on the civil.

"Further, in the Cohen Company case (supra) the Nash decision was cited with approval, and the Chief Justice pointed out (p. 92, 41 Sup. Ct. 301) that while the Lever Act there under consideration afforded no sufficient guide to the jury in their deliberations, because it set up no 'reasonable standard of guilt', yet in the instances of which the Nash case is one it had been found and held 'either from the text of the statutes involved or the subjects with which they dealt (that) a standard of some sort was afforded'. In other words, there is no more difficulty in asking a jury to decide whether a given set of facts constitutes an unreasonable or undue restraint of trade than there is in asking the same jury to answer the question stripped of its adjective.*"

In Point I of the brief of the Government, it is apparently contended that the evidence in this case warrants the finding of a hard and fast price fixing agreement, such as was disclosed in many of the cases referred to under that point. This, as appears from our statement of facts, was not the case. The contention of the Government is that, from the fact that that bulletin prices were largely uniform, it may be inferred that there was an agreement to make them uniform; but if such inference is to be drawn, the further inference must be drawn that any agreement existing along this line was coupled with an agreement that any of the defendants at any time was at full liberty to depart from his bulletin or asking prices.

The Government contends (brief, p. 12) that the rejected requests of the defendants, based on the application of the rule of reason (requests 22-32, R., pp. 672, 675) are academic, and that, although they were sound in law, the court was not bound to grant them, because they were inapplicable to the case. We may answer this argument by examining the consequences of granting one of these re-

* That the so-called "rule of reason" was foreseen is interestingly shown in the last Albert H. Walker's "History of the Sherman Law" (see page 57), a book published before final decision in the Oil and Tobacco cases.

quests, in which the defendants asked that the jury be instructed that they could consider the facts declared to be relevant in the Chicago Board of Trade case (the defendants' 25th request to charge, R., pp. 673, 674). Had this request been granted and the jury directed that they could make the inquiry declared to be proper in that case, the evidence would have warranted the following conclusions by the jury:

1. As to the facts peculiar to the business:

(*a*) So far as concerns the first count, we find that all the defendants are dealing in a standardized product, made of practically the same raw materials, and manufactured by the same methods, and almost entirely by union labor, at a uniform wage scale. All of this, in the nature of things, tended to produce uniform cost of production, which, in turn, tended to produce uniformity in the selling price.

(*b*) As to the second count—we find that the facts surrounding the defendants' dealing with jobbers, are the same as in the case of all other groups of manufacturers doing business in this country.

2. As to the condition of the business before and after the restraint was imposed:

(*a*) As to the first count, we find that no difference has been caused because of any restraint proved to have been imposed by the defendants. The prices realized have been competitive, moderate and fair; in fact, the prices have been so low as at times to have passed below the cost of production. Nothing that the defendants have done has made or can make any change in the situation. The same conditions would exist if they had never conferred together.

(*b*) As to their relations with jobbers:—there has been no change whatever caused in the dealings of the defendants by any restraint that has been proved in this case.

3. As to the nature of the restraint and its effect, actual or probable:—

(*a*) We find, as to the first count, that any uniformity in asking or bulletin prices that has been shown has not limited actual competition as to prices received. The bulletin or asking prices must be substantially uniform in either a rising or a falling market, and when some of the defendants advance their prices the others must, for self-protection, follow suit or be swamped with orders at low prices on a rising market, and, when some of the defendants reduce their bulletin prices, the others must follow suit or be underbid in a falling market. We find that no one is deceived by uniformity in asking prices, as the customers of the defendants are all well aware that the bulletin prices are mere asking prices from which the defendants habitually depart in making actual sales. We find that the restraint, so far as it has been proved, has had no effect, and, if continued, as it now is, that it is not probable that it will have any effect on any actual competition among the defendants.

(*b*) As to the second count:—we find that all that has been proved is a general policy among the defendants to deal with jobbers, which is the same as that existing in all other large manufacturing industries in this country, and that there has been no restraint caused by the adoption of this policy that would not exist among the defendants if they had never seen or communicated with each other, nor is there any probable likelihood of any restraint of trade resulting in the future from the adoption of this policy.

4. As to the history of the restraint:—

(*a*) We find that in this trade the output has become largely standardized and the cost of manufacture has become substantially uniform, so that there cannot be, in the nature of things, a wide difference in prices received. We find that this tendency to uniformity has been stimulated by a reason

able agreement, made during the war, to which the Government was a party, for charging absolutely uniform prices on the large government orders placed with the various defendants during that period and that this tendency to uniformity received a further impetus from a reasonable effort, made by the defendants immediately after the Armistice, to have a general reduction of war prices.

(*b*) As to the policy of dealing with jobbers:—this policy is very common in this country and ante-dates the birth of any of the individual defendants and the incorporation of any of the corporate defendants. The policy was in existence before the defendants ever organized their association.

5. As to the evil believed to exist:—

(*a*) So far as concerns uniformity in asking prices:—Any defendant that did not follow the asking prices of the others, either up or down, would face financial disaster on either a rising or a falling market. So far as concerns any effort of the defendants to get together and cause the export of Class B ware, the evil believed to exist was that if the same factory sold in the same market Class A and Class B ware, the jobbers who purchased from it, and the public, would be exposed to frauds by dishonest plumbers, as there was little difference in appearance between the two classes of goods.

(*b*) As to the second count:—the policy of dealing with jobbers is not deemed to be an evil, but a reasonable policy and is one that is almost universally followed.

In the discussion in the Government's brief of the trial court's charge, and the court's refusal to grant defendants' requests to charge, there is little attention paid to the underlying principle, that the so-called "rule of reason" announced by this court in *Standard Oil Co.* v. *United States*, 221 U. S. 1, and *United States* v. *American Tobacco Company*, 221 U. S. 106, had no application to criminal cases, either for the consideration of the jury or of the Court, but only existed

as a guide to the construction of the statute when a case in equity under the statute was being considered (R., pp. 665-666). There is no mention made, save in a foot note (pp. 24-5, Govt.'s brief), of this view entertained and stated by the trial court. It is only by bearing in mind this underlying view as to the Sherman Act, entertained by the court, that the charge of the court and the court's refusal to charge as defendants requested can be understood.

The question first arose (so far as the record shows) in a discussion with respect to the application of certain evidence offered by the Government. In the course of this discussion the court defined the Sherman Act as denouncing "a combination or a conspiracy which has for its object the interference with the freedom of interstate commerce, that is all." Thereupon counsel for the defendants made the following request: "Won't your Honor add to that, undue and unreasonable interference." To this the Court replied, "I think I will exclude that, Mr. Marshall. It is in accordance with the view I heretofore advanced" (not appearing in the record). To this the defendants excepted (R., p. 83, fols. 248-9).

The question arose again at the close of the testimony upon a motion made by counsel for the defendants for a direction to acquit upon the ground that there was no substantial evidence before the court to support the allegations made in the indictment (R., p. 663, fol. 1987 *et seq.*, pp. 665-6, fols. 1993-8). The sole and only reason which the Court stated for denying this motion was:

> "I wish to say in that regard, that my very careful examination of the whole subject has satisfied me that the grounds, at least the grounds advanced in support of the motion to dismiss that first count of the indictment, are based upon an erroneous, entirely erroneous, theory of the law and the construction to be given to this criminal feature of the Sherman Act.
>
> "The considerations urged by counsel in support of this contention, that the indictment must allege that the combination or conspiracy brought about an unreasonable or undue restraint of commerce, in my judgment

has absolutely no application to a criminal prosecution or to an indictment.

"The considerations urged by counsel might well appeal to the chancellor upon an application in equity for relief by way of an injunction, from injury being suffered through similar acts, under the civil features of the act asking for injunctive relief. *But they have to my mind no application to the consideration of a jury in a criminal case or the consideration of the court in a criminal case.**

"Whether a given act is a criminal offense is purely a question of law to be determined from the language of the particular statute involved and such interpretation as its language warrants; but it must be a fixed and immutable thing as to whether a given act constitutes a criminal offense, and that can never be submitted to a jury.

"The question, of course, as to whether that act has been committed in any instance is a question of fact to go to a jury and under our system they are the exclusive tribunal for the trial of that question, but not for the determination as to whether or not the facts constitute in law a criminal act. And it is for that reason I did not suggest this at the beginning—but it is for that reason, I take it, to my satisfaction at least, that there is nothing in the attitude contended for, in a criminal case.

"Those considerations spring from the ideas suggested by the Supreme Court in the Standard Oil and Tobacco cases and some others, which as I say applied to actions of that character which were bills in equity or equitable relief at the appropriate place. They have none here, unless we are to construe this act in a way that would render it as obnoxious to the constitution and as incapable of enforcement as the act involved in the case of the *United States* v. *Cohen* the so-called Lever Act.

"For these considerations, the motion will be denied."

The view thus expressed was adhered to by the court throughout the trial, particularly in the charge to the jury

*Italics ours.

and in the refusal to charge defendants' requests numbered 22-31 (R., pp. 672-5, 727-9).

The court charged the jury (R., p. 697):

> "On this head, first and most important, let me advise you, so that there cannot be any possible misunderstanding in your minds that it is illegal and a violation of the Sherman Law for a group of independent units, that is individuals or corporations, operating in combination such as a trade association of the character shown here, to agree amongst themselves to fix the prices to be charged for the commodity which the members manufacture, where they control a substantial part of the interstate trade and commerce in that commodity. That proposition you should bear clearly in mind. If you find that the defendants combined and conspired to fix the sale price of sanitary pottery as charged then you will understand that these defendants have contravened the Sherman Act and are guilty as charged in the first count of the indictment, whether, as I have suggested, they ever successfully accomplished that purpose or not. * * *"
>
> "If the minds of these defendants met and they either expressly or tacitly agreed to fix the sale price of sanitary pottery, then these defendants have violated the Sherman Act and are guilty of combining and conspiring to restrain trade and commerce in that commodity as charged against them. Moreover, such an agreement, if you find that it was made, is illegal and a violation of this law entirely regardless of whether the price of the commodity was lowered or increased and such an agreement or understanding is illegal and in violation of the Sherman Law regardless of whether the prices fixed by the combination were reasonable or unreasonable. And such an agreement, understanding or policy, if you find it was made, is illegal regardless of whether the individual defendants whom you find were parties thereto violated the agreement by selling at less than the prices fixed.
>
> "If you find that the defendants combined and conspired to fix the sale price of sanitary pottery any good intention which they may have had in what they did will not make such an agreement or combination legal or excuse them from the consequences of their acts."

To this portion of the charge the defendants interposed appropriate exceptions (R., pp. 723-724).

As to the second count the Court charged the Jury (R., pp. 702-704):

"Under the second count of the indictment evidence has been offered on behalf of the Government to show an agreement or understanding that no sales by any member of the association should be made directly to owners of property, to builders of property, to architects, or to plumbers, and that the sales should be made only to or through so-called 'legitimate jobbers.' Secondly that not only was such an understanding reached or agreement made, or policy determined upon, but that the defendants cooperated from time to time to carry out and enforce such an understanding. Now again I should repeat to you that the mere making of such agreements, if you find they were made, or such understandings, if from all the facts and circumstances you find that such understandings were reached, would in and of themselves be illegal, even though none of them were successfully carried out, and that would be true even though the association or combination provided no machinery to carry them out. You should not concern yourself with the question whether in the absence of such an agreement the defendants nevertheless would have restricted their sales to jobbers, nor are you to inquire whether that is a commendable or usual trade practice." * * *

"If you find that the minds of these defendants met and they tacitly or expressly agreed to restrict their sales to jobbers, then the defendants have contravened the Sherman Act and are guilty of combining and conspiring to restrain trade and commerce in that commodity as charged in the second count of the indictment. If, therefore, you find from all the evidence bearing on the subject some promise, either express or implied, or any assent to the proposition that the defendants should conform their conduct to some prescribed rule the aim and purpose of which was to restrict their sales to jobbers only, then under the law the defendants are guilty of a combination and conspiracy to restrain trade. And if you find that the defendants did so combine and conspire to restrict their sales to jobbers only, any good intentions they may have had in such course will not make such an agreement legal or relieve defendants from the consequence of their acts. You will not consider in

this connection any suggestion that the course pursued was necessary to the protection of the jobber or promotive of the public welfare."

To this portion of the charge appropriate exception were interposed (R., pp. 724, 725).

The trial court refused the following requests to charge (R., pp. 672-675):

"22. For you to find a verdict of guilty against any defendant, it is not enough for you to find that a conspiracy in fact existed. If no combination or conspiracy in fact existed that will end your task and you must find a verdict of not guilty against all the defendants. If you find that a combination or conspiracy did in fact exist, you then approach a task in which you must exercise the greatest care, for in order to find any defendant guilty it is not enough that he should have engaged in a conspiracy. It is not enough that he should have been engaged in a conspiracy in restraint or competition. You must be satisfied beyond a reasonable doubt that he engaged in a conspiracy which unduly and unreasonably restrained trade.

"23. The essence of the law is injury to the public. It is not every restraint of competition and not every restraint of trade that works an injury to the public; it is only an undue and unreasonable restraint of trade that has such an effect and is deemed to be unlawful.

"24. In considering whether a combination unduly and unreasonably restrained trade, you must have in mind and carefully consider all the facts in evidence with relation to the nature and character of the business.

"25. Not every combination or agreement which affects prices constitutes an illegal restraint of trade. The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition. To

determine that question, you must consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained are all relevant facts.

"26. If you are satisfied beyond a reasonable doubt from the evidence that there was a combination during some part of the three years prior to the finding of the indictment, among the defendants, or some of them, to fix uniform and non-competitive prices for the sale of sanitary pottery, then it would be your duty next to inquire whether that was a reasonable restraint of trade or on the contrary an unreasonable restraint of trade. If it was a reasonable restraint of trade in your opinion, then it would not imply guilt, though it was a price fixing agreement. On the other hand, if it was an unreasonable restraint of trade in your opinion, then guilt would follow as to those of the defendants who were parties to it.

"27. Not all price-fixing arrangements or combinations are illegal. In order to find a defendant guilty, if you find that he was a party to a price-fixing combination, such combination must be found by you to be an unreasonable or undue restraint of trade in order for the combination to be illegal; and whether it was an unreasonable restraint of trade or not is to be determined by you from all the facts and circumstances; you are the judges of whether such combination was reasonable or unreasonable.

"28. The essence of the law is injury to the public. It is not every restraint of competition and not every restraint of trade that works an injury to the public; it is only an undue and unreasonable restraint of trade that has such an effect and is deemed to be unlawful.

"29. If the jury find from the evidence that there was no unreasonable restraint of trade effected and no undue or unreasonable prices brought about by any combination and no injury caused to the public and that the price of the product was not put up to any figure that

caused the public to make unreasonable concessions as to price, terms or conditions, then the jury must find the defendants not guilty.

"30. A restraint of trade does not constitute a violation of law unless such restraint be an unreasonable restraint.

"31. No defendant can be found guilty unless the jury find beyond a reasonable doubt that he or it entered into a combination or conspiracy to restrain competition to an unreasonable or undue degree or to cause some substantial prejudice to the public interest.

"32. None of the defendants may be found guilty unless the jury find that he or it was engaged in a combination within three years of the date of the indictment which did or was intended to restrain or affect to a substantial extent prices with which purchasers were to be charged and thereby operated in a material degree to the injury to the public and beyond what can fairly be said to constitute a proper protection to the parties to the alleged combination or agreement.

* * * * * *

"48. The cutting of sales prices to a point below the cost of production with intent to engage in destructive and cut-throat competition for the purpose of eliminating competitors is obnoxious to the law. If the jury shall find from the evidence that the defendants, Weaver and Slater, when they called upon Douglas to ask him to raise his prices, believed that Mr. Douglas was selling below cost and was starting a destructive trade war in the territory where they sold their goods, and if such belief was justified by the facts, then the defendants, Weaver and Slater, had a right to remonstrate with Mr. Douglas against the continuance of such practice and to ask him to bring his prices up to a level which would not be below the cost of production, and it was not illegal for Mr. Douglas to agree with them to refrain from selling pottery below the cost of production.

"49. Any of these defendants had the right to remonstrate with any other manufacturer engaged in their line of business against the cutting of prices below cost and precipitating a destructive and cut-throat competition; and if the jury find from the evidence that a salesman of the defendant, Horton Pottery Company, had

been offering goods at prices below cost of manufacture, then it was not illegal for the defendants, Stern or Maddock, to complain of such practice and to remonstrate with the Horton Pottery Company and the defendant Horton, against the continuance of selling output below the cost of production and it was not illegal for the defendant, Horton, to accede to such arguments and discontinue the sale of pottery below the cost of production.

"50. For one or more of the defendants to remonstrate with other manufacturers or with another manufacturer engaged in their line of production against the initiation of sales below cost of production or the starting of a destructive trade war is not obnoxious to the law, provided such remonstrance is in good faith, and is not made in pursuance of a combination in restraint of trade" (R., pp. 681-2).

And especially as to the Second Count the defendants requested charges:

"55. Under the second count of the indictment, the defendants are not charged with a combination or conspiracy to deal with jobbers as a class, but are charged with having agreed and combined to limit and confine their sales to a special group selected by defendants by agreement; and the jury may not convict any of the defendants under the second count unless they find that there was a conspiracy to deal with such a special group, and that said special group had certain determining characteristics which differentiated them from all other persons with whom the defendants might have dealt.

"56. Even though the jury should find that the defendants or some of them by combination or agreement confined their sales to jobbers as a class, they may not convict under the second count of the indictment for the reason that the indictment does not charge any agreement to deal with jobbers as such, but charges an agreement to deal only with a special group selected by agreement by the defendants."

To the refusal of all of these requests the defendants excepted (R., pp. 726, 729).

The question arising here is whether the activities of the defendants shown in this case were *per se* a violation of the

Sherman Act. That they would not have been held a violation of the law had the case been tried by the court without a jury is apparent from the language of the Circuit Court of Appeals. That court said (R., p. 3700):

> "It is not necessary to review the facts at large; sufficient to note that the subject matter of prosecution is a trade agreement to maintain a central bureau of information, disseminate knowledge of prices, customers, discounts, etc., obtained thereby, and thus persuade or induce the large number of sanitary pottery manufacturers who belonged to the association to conduct their business in a *reasonably* uniform manner as to prices and discounts, and protect the jobbers who constituted their largest normal 'outlet'." (Italics ours.)

Moreover the argument of the government overlooks the second count of the indictment almost altogether. The refusal to grant any of the defendants' requests to charge as to the rule of reason means, in this case, that if a number of manufacturers adopt the policy of dealing through jobbers, the jury may not consider whether it is reasonable for them to do so.

The charging of concededly reasonable prices, and the practice of dealing through jobbers, may occur under circumstances which would warrant a finding that trade was unduly restrained. But surely there may be circumstances under which either a court or jury ought to find that any restraint of trade produced in either manner is not unreasonable. This latter proposition was denied *in toto* by the trial court.

If the view of the trial court were sound, a defendant who, in an injunction suit, had successfully supported a combination as not unduly or unreasonably restraining trade, might thereafter be indicted, convicted and imprisoned for having entered into such combination on the ground that it effected a restraint of trade, although not unduly or unreasonably. A view which would lead to such a result cannot be accepted without rendering the Act ridiculous.

The trial court was led to adopt the view that the rule

of reason laid down in the *Standard Oil* and *Tobacco* cases cannot be invoked in a criminal case because to apply it in such a case would, so it is thought, render the Sherman Act as obnoxious to the constitution and as incapable of enforcement as the act involved in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81—the so-called Lever Act. The fallacy of this reasoning is shown in the portion of the opinion of the Circuit Court of Appeals, quoted at the outset of this point (*ante*, p. 20).

While *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, and *United States* v. *Joint Traffic Association*, 171 U. S. 505, were at first taken by many to hold that the prohibitions of the Sherman Act were not limited to cases where the restraint is unreasonable, the error of this view was pointed out in the *Standard Oil* case, where it was unequivocally stated that the words "restraint of trade" in the statute referred only to undue and unreasonable restraints, and this doctrine, reiterated in the *Tobacco* case, has never since been modified.

No attempt is made in the Government's brief to support the ruling of the trial court that this doctrine, although applicable in an equitable proceeding, has no application in a criminal case. Instead the petitioner argues that the Government was not required to prove that the defendants fixed unreasonable prices—an issue which is not at all involved in the case.

The petitioner's brief cites a number of decisions of this court as authority for the proposition that any price-fixing agreement is *per se* an unlawful restraint of trade. A careful examination of those decisions, however, discloses that they do not sustain the Government's view.

The authorities cited by the petitioner add little weight to its contention. Not one of them is a criminal case—not one of them remotely suggests that the construction of the statute in a criminal case differs from its construction in a civil case. And every one of them decided since the *Standard Oil* decision in 1911 expressly applied the test of reason which was rejected by the trial court in this case.

All of the decisions referred to in the first point of the petitioner's brief were proceedings by bill in equity under the Sherman Act except *National Cotton Oil Company* v. *Texas*, 197 U. S. 115, which involved the construction of a Texas statute, and *Thomsen* v. *Cayser*, 243 U. S. 66, which was a civil suit for damages. None of them gives any support to the view of the trial judge that no consideration of reason is involved in a criminal case.

Nor are they authority for the proposition that the question of reason is not a question of fact. Of course in all of the equity suits, where there was no jury, the question of reason was decided by the Court, but in such case the Court decided questions of fact as well as of law. While in the case of a written contract the interpretation of which is for the Court (as in the *Joint Traffic Association* case) or cases arising on demurrer (as in *Swift & Co.* v. *U. S.*, 196 U. S. 375; *National Cotton Oil* v. *Texas*, 197 U. S. 115, and *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373), where all questions are for the Court, the question of reason is one of *fact*. The modern rule is well stated in Wigmore on Evidence (2d Ed.), Vol. 5, Sec. 2553, as follows:

> "There are many situations in which the issue of reasonableness of conduct presents itself. In general it is recognized as an issue of fact for the jury."

Not only has the question of reasonableness uniformly been submitted to the jury in cases of homicide (*People* v. *Hubert*, Ill. 1911, 96 N. E. 294, 296), malicious prosecution (*Western Union Tel. Co.* v. *Thomasson*, 251 Fed. 833, 835—C. C. A., 4th Circuit, 1918), false imprisonment (*Fagan* v. *Knox*, 66 N. Y. 525), but also as pointed out in the *Nash* case, in many other cases, and it has been expressly held that whether a restraint of trade is reasonable is a question of fact (*United States* v. *United States Steel Corporation*, 223 Fed. 55, affirmed 251 U. S. 417), where Judge Buffington said (p. 61):

> "The basic question for us to decide *is one of fact*, namely, whether the union of the several defendant com-

panies in the United States Steel Corporation 'prejudices the public interest by *unduly* restricting competition or *unduly* obstructing the course of trade'."*

And again (p. 78):

"Monopoly and unreasonable restraint of trade *are, after all, not questions of law.*"

To the same effect are *Miller* v. *Strahl*, 239 U. S. 426; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *C. A. Weed Co.* v. *Lockwood*, 264 Fed. 453, 266 Fed. 785, and *Nash* v. *United States*, 229 U. S. 373.

That in a criminal case all questions of fact must be submitted to the jury is too well established to require the citation of authorities.

Nor do the decisions cited by the petitioner's brief support the contention that any price-fixing arrangement is *per se* illegal. All that they do is to show that in certain cases, a court which passed upon fact as well as law found a particular arrangement illegal. In the only case cited which was tried before a jury (*Thomsen* v. *Cayser*), the jury found that the rates exacted by the defendants were unreasonable (Briefs for Plaintiff in Error, 243 U. S., at p. 77; Opinion, *Id.*, p. 88), although the fact of combination was decided by the Court, there being no conflict in the evidence. In that case, therefore, while the fact of combination, not being controverted, was properly assumed by the Court, the reasonableness or unreasonableness of the *effect* of the combination was submitted to the jury.†

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* Italics ours.

† The trial judges in the southern district of New York have adopted the view that the question of reasonableness should be submitted to the jury in Sherman Act cases. Thus in 1917 the case of *United States* v. *Aileen Coal Company et al.* was brought on for trial before Judge Grubb and a jury in the District Court in which the present case was tried. The indictment charged a combination or conspiracy to restrain trade in violation of the Sherman Act by fixing and maintaining minimum prices for coal. The learned judge adopted and applied the rule of reason laid down by the Supreme Court in the foregoing cases and left it to the jury to determine whether or not the restraint of

Even if the petitioners' view that the question of reasonableness could properly be taken from the jury and passed upon by the Court in this case, the Circuit Court of Appeals was nevertheless right in reversing the judgment of the District Court. For the trial judge explicitly ruled that the question was to be considered neither by the jury as a matter of fact, or by the Court, as a matter of law, saying

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trade effected by the combination was undue or unreasonable. In instructing the jury on this subject, Judge Grubb said:

"Now one of the tests, probably, you have a right to look to in making that determination is this: the courts have said that such agreements in restraint of trade may be made by persons provided they afforded only the necessary protection to the persons making them, and in their business, against ruinous competition or bad trade practices; and provided that they are not any such unreasonable restraint of trade as to unduly injure, by their fixing of prices, the public; that is, the consumers, who are the purchasers of the product, of those who enter into the combination. You see, the law recognizes the two purposes; one, that it could be a necessary and reasonable protection to those who enter the combination where the situation requires protection, and the other that of the public, that no such combination be considered legal which unduly restricts competition by fixing prices and thereby works unreasonable injury to the public. * * * On the contrary, if there was ruinous competition, and trade practices that were injuriously affecting the proper conduct of the trade, then that would be a situation which might call for the making of an agreement between the parties to correct that situation. However, as I have said, it could not be done at the expense of the public and to the extent of injuring and restricting trade to the injury of the public." (Stenographer's Minutes, *U. S.* v. *Aileen Coal Co.*, pp. 2268-2269.)

"If, on the other hand, you are satisfied beyond a reasonable doubt, from the evidence, that there was a combination during some part of the three years prior to the finding of the indictment, among the defendants, or some of them to fix a minimum price for the sale of contract coal, then it would be your duty next to inquire whether that was a reasonable restraint of trade, or, on the contrary, an unreasonable restraint of trade. If it was a reasonable restraint of trade, in your opinion, then it would not imply guilt, though it is a price fixing arrangement. On the other hand, if it was an unreasonable restraint of trade in your opinion then guilt would follow as to those of the defendants who were parties to it.

"As I said, not all price fixing arrangements or combinations are illegal." (Stenographer's minutes, *U. S.* v. *Aileen Coal Co.*, p. 2267.)

"Then you would also have a right to take into consideration the effect of such combination to fix prices upon the purchasers and consumers in the market; that is, how much injury they would suffer from an agreement to maintain and fix minimum prices, as against a situation where prices were free to be made without

with respect to the considerations of reasonableness (R., p. 665, fol. 1995):

> "* * * They have to my mind no application to the consideration of a jury in a criminal case, *or the consideration of the Court in a criminal case.*"

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obligation on the part of any operator to expect any fixed price. As I have said, if that in your opinion was so great as to be unduly and unreasonably in restraint of trade and to the injury of the public, then that would be against the reasonableness of such a price-fixing arrangement. In other words, you balance the benefit to the operators with the injury to the public and make your own deductions as to whether it was an agreement, under the circumstances that it was made and under the methods under which it was conducted, with the conditions existing at the time it was made, which was or was not a reasonable agreement in restraint of trade—of course, any price-fixing arrangement is, in its nature, a restraint of trade." (Stenographer's Minutes, *U. S.* v. *Aileen Coal Co.*, p. 2271.)

Judge Grubb also granted a request by the defendants to charge as follows:

> "# 37. The essence of the law is injury to the public. It is not every restraint of competition and not every restraint of trade, that works an injury to the public, it is only an undue and unreasonable restraint of trade that has such an effect and is deemed to be unlawful." (Stenographer's Minutes, *U. S.* v. *Aileen Coal Co.*, p. 2296.)

In 1922 the case of *United States* v. *Atlas Portland Cement Co. et al.* was brought to trial in the same court before Judge Knox. In that case the defendants were charged with a conspiracy to fix and exact excessive prices for Portland cement. The judge charged the jury in part as follows:

> "The question of price of any given commodity is a most important one. It is the one which instantly occurs to us in every commercial transaction and it is the most outstanding feature of this case. With that in view, I am going to ask you to consider if, over the period of time you may find any combination or conspiracy to have existed, and within three years of August 8, 1921, the result of such combination or conspiracy, and through the instrumentality of the practices enumerated in the indictment to have been carried on by the Protective Association, was that the price of cement was substantially greater than it would have been but for such combination or conspiracy. Also, has the supply of cement been so regulated and controlled by reason of any such combination or the trade practices mentioned that the public in purchasing the same has been required to make unreasonable concessions as to price, terms and conditions that it would not have been required to make had no combination or conspiracy existed?" (Stenographer's minutes, *U. S.* v. *Atlas Portland Cement Co. et al.*, p. 4239.)

In view of this statement by the trial judge, it is apparent that he never gave any proper consideration to the question of reasonableness which was an essential element of the case.

The doctrine declared by the trial court, and adhered to with inexorable logic to the very end, is so repugnant to one's sense of justice that it is difficult to discuss it calmly. As this court found it necessary in the *Standard Oil* case to read the rule of reason into the Sherman Act in order to save it from public condemnation, so here the rejection of such views as those expressed by the trial court with respect to the meaning of the Act when applied to a criminal case would seem to be necessary if the Act is to retain the respect of right-thinking men.

The rule thus adopted was recognized by the Department of Justice, and followed even in criminal prosecutions until this case. An examination of all of the indictments found under the Sherman Act in which price fixing was charged between the date of the Standard Oil decision and the date of the indictment of these defendants, shows that every one of them which ever went to trial contains an allegation that excessive, extortionate, or unreasonable prices were exacted, or that the restraint was in other ways unreasonable (*post*, p. 73).

The ruling of the trial judge as to this was not only prejudicial as to the charge of price fixing set forth in the first count. It was, if possible, even more prejudicial in its application to the charge set up in the second count of confining sales to jobbers.

It is apparent throughout the record that "legitimate jobbers" meant actual jobbers—those who were conducting a bona fide jobbing business. It has never been held that for manufacturers to deal as wholesalers, and to sell exclusively to jobbers, is improper. Yet, the trial judge, as a direct consequence of his view that no consideration of reason was applicable in a criminal case, went so far as to charge that if the defendants gave assent to the proposition that

they should restrict their sales to jobbers only, they were guilty of a crime (R., p. 703, fol. 2109). The facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, actual or probable; the history of the restraint; the evil believed to exist; the reason for adopting the particular remedy; the purpose or end sought to be obtained; all of which were held in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, to be relevant facts, were all excluded from consideration in this case.

The Government, in discussing the rulings in question, ignores entirely their application to the charge made in the second count of the indictment, and confines its argument to the proposition that no price fixing arrangement between persons representing eighty per cent. of an industry can ever be legal.

This court, in the *Standard Oil* case, and in all of its subsequent decisions, has taken pains to point out that the Sherman Act is not an arbitrary statute setting up a hard and fast rule, but a reasonable act, under which each case must be decided upon its own particular facts, and judged in the light of reason—the great standard of the common law. Is the court now, in the first criminal case where the question has been presented, to make an exception—to hold that there are two fields of activity, one of which is to be governed by a rule of reason, and the other by an arbitrary rule, from which all considerations of reason are to be excluded? Is the court to hold that the field of prices is to be made an exception to the general rule that the act is to be interpreted in the light of reason, and to go further, and say that this exception is only to be recognized in criminal cases?

This Court cannot hold that no rule of reason is to be applied in an equity suit to restrain a price fixing arrangement, without repudiating the *Chicago Board of Trade* case. But if it holds that the considerations of reason there applied cannot be applied in a criminal case, then it must be pre-

pared to hold that the defendants in that case could be indicted, convicted and sent to jail for doing the very things which this court refused to enjoin because, being reasonable, they were no violation of the statute.

It is easy to conceive of cases involving an agreement as to prices that would be *per se* unlawful. But is the court to hold that *no* price fixing agreement can ever be lawful? Or that no question of reason can ever be submitted to the jury in such a case? If this is the law, then every member of a trade association, who, at the request of the Government, as these defendants did, fixed a uniform price for government orders during the war, should have been punished, together with the public officials at whose request the agreement was made. All of those who agreed, as did these defendants, to reduce prices after the war, pursuant to the urgent recommendations of all of the economists and public officials who were crying abroad the slogan "Back to Normal" should have been punished. For, as the matter affected prices none of those considerations held in the *Chicago Board of Trade* case to be the test by which a violation of the Sherman Act must be determined, could be considered at all.

If the question of reason was involved in the case—and we can reach no other conclusion than that it was—it was one of fact, which should have been submitted to the jury. That this is a question of fact was distinctly held in *United States* v. *U. S. Steel Corporation* (*ante*, pp. 34, 35).

II.

The instruction of the trial court, discussed in Point II of the Government's brief, warranted a conviction of the defendants without a finding by the jury of one of the essential constituent parts of the crime set out in the indictment, the finding of which was requisite to give the court jurisdiction to try the case.

From opinion below:

"The question growing out of the first fact is this: Did the trial court err in instructing the jury in substance (though in several forms and at various times) that if they found that the defendants did conspire to restrain trade, as charged in the indictment, then it was immaterial whether such agreements were ever actually carried out, whether the purpose of the conspiracy was accomplished in whole or in part, and whether (finally) "any effort was made to carry" the object of the conspiracy into effect.

"That as a general proposition of law under the Sherman Act this instruction was correct is a commonplace (Nash v. United States, 229 U. S., 373, 33 Sup. Ct. 780, 57 L. Ed. 1232). This is because, as the case cited puts it, conspiracy under the Sherman Act is punished on a common-law footing, and no overt act is necessary for conviction, because the offense is complete with the formation of the illegal meeting of minds. But we are persuaded that both the prosecution and the learned court overlooked the peculiarities of this case. None of the parties proceeded against lived within the Southern District; the indictment does not charge that any conspiracy was formed in that district; consequently there was no jurisdiction there to bring the indictment or there to try the case unless it was shown that jurisdiction was conferred by the commission of an overt act within the Southern District (Easterday v. McCarthy, 256 Fed., 651, 168 C. C. A. 45).

"The pleader understood this, for otherwise all the allegations concerning acts done in the Southern Dis-

trict in pursuance of the object of the conspiracy were mere surplusage. Why the United States was so anxious to institute and prosecute this case in the City of New York we do not know, but the frame of indictment, compared with the undisputed facts, show that New York was intentionally selected, and trial of these defendants in the Third Circuit, where most of them resided, was sedulously avoided. Such a choice as this carried with it the burden of proving something done in the Southern District, i. e., an overt act—justifying the finding of an indictment therein. The peculiarity of this transplanted litigation was overlooked below, and it was error, and very material error, to instruct a New York jury in so many words that it was immaterial whether any effort had ever been made to carry out the conspiracy complained of."

In the second point of the Government's brief there is set out, on page 28, only a portion of the part of the record relevant to the point under discussion. A correct understanding of the point cannot be had without a consideration of the facts which do not appear from the portion of the record cited in the Government's brief.

The charge of the court (R. 695):

> "I must, therefore, advise you that if you find the defendants combined and conspired to restrain trade by entering into the agreements charged in the indictment, then these agreements violated the Sherman Act, and it is immaterial whether such agreements were actually carried out or have accomplished their purpose in whole or in part."

The charge of the court (R. 697):

> "If you find that the defendants combined and conspired to fix the sale price of sanitary pottery as charged then you will understand that these defendants have contravened the Sherman Act and are guilty as charged in the first count of the indictment, whether, as I have suggested, they ever successfully accomplished that purpose or not. It is, as I have said, the entering into the illegal combination or conspiracy which violates the Act. If the minds of these defendants met and they either ex-

pressly or tacitly agreed to fix the sale price of sanitary pottery, then these defendants have violated the Sherman Act and are guilty of combining and conspiring to restrain trade and commerce in that commodity as charged against them."

Exception taken by defendants to this portion of the charge (R., pp. 722-3):

"I respectfully except to that portion of your Honor's charge wherein your Honor stated that a mere agreement constitutes an offense, whether anything is done to carry it out or not, and where your Honor went on to say that it is immaterial whether agreements are carried out or not. That latter phrase, that it is immaterial whether the agreements were carried out or not, I submit is wrong——

"The Court: Immaterial for the consideration of the jury.

"Mr. Marshall: That is precisely what I want to bring to your Honor's attention—that I submit they are material from the aspect of determining whether the agreement was made, and if the jury find they were not carried out, it may be cogent evidence in their minds that the agreement was not made. Your Honor has put it so strongly here that I think your Honor——

"The Court: The jury may consider all the facts and circumstances in determining whether a combination and conspiracy has been entered into. But, if you will note, what I charged the jury is that they have determined that such a combination and conspiracy was entered into, then it is immaterial whether any effort was made to carry it out.

"Mr. Marshall: I respectfully except to the charge as modified."

The first two portions of the charge, above quoted, are sound law, as it was not necessary for the Government to prove that the agreements accomplished their purpose. The only bases for exceptions to these two pronouncements of the court were that they tended to confuse the jury by leading them to believe that the proof which had been introduced by the defendants, to the effect that no such agree-

ment as stated had ever been carried out, was immaterial on the issue of whether or not there had been an agreement. This criticism of these first two statements of the court was accordingly presented and is quoted on page 43 *ante*. To this proposition the trial judge assented, stating that the jury could consider everything, but then went on to greatly modify and enlarge the two prior statements which he had made to the jury, and charged he jury that it was immaterial whether any effort was made to carry out the alleged conspiracy. To this an exception was taken, in which it was pointed out that the prior charge had been modified and that the defendant excepted to the charge as modified. Manifestly, the exception to the modified charge was not based on the same theory as the exception theretofore taken to the first two portions of the charge on this subject, as the court had conceded the correctness of the criticism involved in the exception to these first two portions of the charge.

The effect of this portion of the charge to the jury is very succinctly stated in the opinion of the Circuit Court of Appeals (R., pp. 3700-1).

It is obvious that what the government classes as a point involving venue is rather a point involving the jurisdiction of the court itself.

The defendants under Art. III, Section 2, of the Constitution of the United States, which provides that

> "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trials shall be held in the State where the said crime shall have been committed"

were guaranteed the right to be tried in the state where the alleged crime was committed. (See also amendments to Constitution, Art. VI.)

It was by a divided court, in fact by a bare majority, that this court held that a conspiracy entered into in one State can be prosecuted in a district outside of that State, provided overt acts in pursuance of the conspiracy are proved to have occurred in the district where the indictment is found. *Hyde*

v. *United States*, 225 U. S., 347. Since that memorable decision, the law on this subject has been deemed settled.

As pointed out by the Circuit Court of Appeals, the pleader who drew the present indictment, alleged in each count of the indictment that a conspiracy, not stated to have been formed in New York, was continued and carried out in New York by the commission of various overt acts. These allegations were plainly designed to bring the case within the doctrine of *Hyde* v. *United States* (*supra*), and proof of these allegations was essential to the jurisdiction of the court in New York to try the case.

At the close of the trial, after every purchaser who testified, so far as he was allowed to testify, had given evidence tending to show that no conspiracy to maintain uniform, arbitrary and non-competitive prices was in fact being carried out, the court permitted the Government to retire from the position taken in the indictment (that uniform, arbitrary and non-competitive prices had been in fact maintained and that the defendants had in fact handed their sales to a "special group") to the position that there had been a naked and unperformed conspiracy; and charged the jury that if they found the defendants had conspired to restrain trade as charged in the indictment, it was immaterial whether such agreement was ever actually carried out, whether the purpose of the conspiracy was accomplished in whole or in part or whether "any effort was made" to carry the object of the conspiracy into effect.

The erroneous charge here complained of was not an accidental misuse of language. It embodies a proposition advanced by counsel for the Government in the early stages of the defendants' case. In attempting to exclude some testimony offered by the defendants, counsel for the Government advanced the argument that "what the law condemns is the making of an agreement, even if nothing is ever done to carry it out" (R., p. 375, fols. 1123-25). To the ruling made on this occasion the defendant excepted (R.,

p. 376), but it is not clear that the ruling was based on the argument, just quoted, of the prosecuting attorney.

None of these defendants lived in New York. Some of them lived as far away as California. It is a shocking proposition that jurisdiction can be obtained in a New York court to bring defendants from all parts of the country to try them in New York by making allegations that overt acts of the conspiracy have been committed in New York; and that the prosecutor may then be relieved on the trial of the necessity of proving such overt acts and the jury instructed that the defendants may be convicted although such acts were never done at all. It is submitted that this point requires no argument or discussion beyond its mere statement.

The Government's brief fails adequately to meet the issue presented, and seeks to treat the matter as a failure of the court to give an instruction as to venue which was not requested. The error is of an entirely different character. It is not the failure to give a charge that is complained of, but the giving of an incorrect charge, which warranted the jury in convicting the defendants without finding the commission of the overt acts which were essential to the jurisdiction of the trial court.

It is claimed, in the Government's brief (p. 29), that there is undeniable evidence in the record that there were overt acts, committed in the Southern District of New York, of the alleged conspiracy, and for this reason it is of no consequence that the jury were not required to find that such overt acts had been committed. This argument seems to us remarkable. The defendants denied below, and deny here, that there was evidence either of a conspiracy or of the commission of overt acts. If the Government believed that it had proved the commission of overt acts, it should not have avoided submitting that essential element of its case to a jury.

It is outside the province of an Appellate Court, in a criminal case, to pass on controverted questions of fact, and, as pointed out above, it would be an invasion of the constitutional rights of the defendants to have a jury trial, if an

Appellate Court were to make, at the instance of the prosecutor, a finding of fact essential to the conviction.

The Government does not go so far in its brief as to contend that the instruction given was correct. Instead, it argues that the matter was not raised by a proper exception.

In this connection we point out that, with or without exception, either the Circuit Court of Appeals or this court, had the unquestioned right to notice such an error. Rule 11, Circuit Court of Appeals for Second Circuit; Section 4, Rule 25, Rules of the U. S. Supreme Court.

This error, involving, as it does, a violation of the defendants' constitutional rights and the very jurisdiction of the court to try the case, belongs to that class of errors which it is the right and duty of Federal Appellate Courts to notice, whether the question is raised by counsel or not. *Fore River Shipbuilding Co.* v. *Hagg*, 219 U. S. 175; *Mansfield, etc., Railway Co.* v. *Swan*, 111 U. S. 379; *Schick* v. *U. S.*, 195 U. S. 65, (where this court, of its own motion, noticed a question not raised by counsel, and determined whether or not, on the trial, there had been an infringement of Article III, Section 2 of the Constitution).

Indeed, it is probable that the mandate of Article III, Section 2 of the Constitution could not be waived, and jurisdiction could not be conferred by the actual consent of the parties. *Dickinson* v. *U. S.*, 159 Fed. 801; *Low* v. *U. S.*, 169 Fed. 86, 91; *Schick* v. *U. S.*, 196 U. S. 65.

But the exception was entirely adequate, and was put in a form which the trial court itself explicitly approved, in dealing with other exceptions, a few moments after the exception was taken.*

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* "The Court: You need not argue anything. All you need to do is to put your finger on the feature of the charge you except to, and reserve your exception" (R. p. 723, fol. 2169).

* * * * * * *

"The Court: The distinction is this: When you are excepting to something that is in the charge of the court, you must state the substance of it.

"Mr. Marshall: I have tried to do that.

"The Court: Yes, you have done that. But your written requests need not be covered that way, but you simply say you except to the refusal to charge" (R. p. 726, fol. 2177).

An exception to a designated portion of a charge is good.

Lucas v. *U. S.*, 163 U. S. 612-618.
Price v. *Pankhurst*, 53 Fed. 312-313.
Columbus Construction Co. v. *Crane Co.*, 101 Fed. 55.
Hindman v. *First National Bank*, 112 Fed. 931.

In *Hicks* v. *United States* (1893), 150 U. S. 442, the portion of the charge was not designated with anything like the precision with which it was designated in this case. Yet the Court held the exception sufficient, saying (p. 453): "The learned judge below seems to have been satisfied with the shape in which the exceptions were presented to him, and we think they sufficiently raise the questions we have considered".

As stated in *Farnsworth* v. *Union Pacific Coal Co.*, 89 Pac. 74, 77 (Utah, 1907) it is not necessary to give any reason in stating an exception, as giving a reason is but argument, which should be made when the instruction is presented for review, all that is necessary being to point out to the judge the particular portion of the charge to which objection is made.

The reference in the petitioner's brief (p. 32) to the dissenting opinion in *Frey & Son, Inc.* v. *Cudahy Packing Co.*, 256 U. S. 208, overlooks the fact that in that case the Court considered the very point which in the dissenting opinion is said not to have been raised by a proper exception, and sustained the action of the Circuit Court of Appeals, based thereon, in reversing the judgment of the trial court.

Even should we grant the correctness of the extremely technical criticism of the exception taken to this portion of the charge of the court, the Government is left in the position of asking this court to reverse the Circuit Court of Appeals for acting within its own rules and noticing a plain error not assigned. That the error was plain cannot be and is not, as we understand the Government's brief, disputed.

If the exception were not properly taken, the question

of whether or not the error should be noticed was one addressed to the discretion of the Circuit Court of Appeals, and this court will not review the exercise of discretion by the court below "unless misuse or abuse of discretionary power plainly appeared." (*Rio Grande Irrigation and Colonization Co.* v. *Gildersleeve*, 174 U. S. 603; *Harrison* v. *Perea*, 168 U. S. 311, 325, 326.)

The case is directly within the rule announced in *Mahler* v. *Eby*, 264 U. S. 32, where this court said (p. 45):

> "It is said that no exception was taken to the warrant on this account until the filing of the brief of counsel in this court. There was an averment that the warrant was void without definite reasons in the petition of habeas corpus. There was nothing of the kind in the assignment of error. But we may under our rules notice a plain and serious error though unassigned. Rules 21, secs. 4 and 35, sec. 1, 222 U. S., Appendix, pp. 27, 37; *Wiborg* v. *United States*, 163 U. S. 632, 658; *Clyatt* v. *United States*, 197 U. S. 207, 221-222; *Crawford* v. *United States*, 212 U. S. 183, 194; *Weems* v. *United States*, 217 U. S. 349, 362. The character of the defect is such that we cannot relieve ourselves from its consideration. The warrant lacks the finding required by the statute and such a fundamental defect we should notice. It goes to the existence of the power on which the proceeding rests. It is suggested that if the objection had been made earlier it might have been quickly remedied. There was no chance for objection afforded the petitioners until, after the warrant issued, in the petition for habeas corpus. The defect may still be remedied on the objection made in this Court."

III.

The trial court erred in permitting questions as to whether the J. L. Mott Company and the J. L. Mott Iron Works had not pleaded guilty to a violation of the Sherman Act.

From opinion below:

> **"The same theory of action was carried further in the examination of one Bantje, an employee of the J. L. Mott Company (not a defendant), who was asked, over objection, this question: 'You know that your concern pleaded guilty to a violation of this very law in this very court?' The theory, frankly stated, on which the question was allowed, was that the matter affected the credibility of the witness, and this reason was given after the witness had declared that he personally did not know anything at all about it. We are not aware of any other ruling heretofore made which in effect impugns the veracity of a whole body of employees because the corporate employer had previously pleaded guilty to an infringement of the Sherman Law."**

There is no merit in the statement in the footnote on page 8 of Government's brief that the Circuit Court of Appeals would not have reversed the judgment of the District Court because of the matters discussed in this and the next two points. This contention is based solely upon the fact that the Circuit Court of Appeals referred to them as "minor points." But they were "minor" only by comparison. The Circuit Court of Appeals discussed them expressly "because there may be a new trial". Far from giving rise to any inference that these errors would not alone have constituted sufficient ground for reversal, this indicates that the Circuit Court of Appeals felt that a repetition of these errors at a second trial would invalidate any judgment against the defendants, and clearly amounts to an admonition lest a second judgment be reversed. The matters referred to by the

Circuit Court of Appeals as "minor points" are real and prejudicial errors. Their presence in the record is not of the defendants' seeking. They were allowed to enter over the defendants' vigorous objection at the insistence of the Government, and the Government should not now be allowed to argue that they are matters of no importance.

As the Court said in *Miller* v. *Territory of Oklahoma*, 149 Fed. 330 (at page 339):

> "The foregoing incident strikingly illustrates where the responsibility for the miscarriage of justice in criminal prosecutions should sometimes be placed, instead of imputing the reversal of conviction by the appellate courts to what is popularly termed 'mere technicalities'. The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts them to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous fact supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty."

The witness, Bantje, called by the defendants, was a purchasing agent for a large corporation which purchased part of the product of many of the defendants. He had testified that his purchases were made at greatly varying prices, and that in the majority of instances his purchases were made at prices from 5% to 25% or 30% below the bulletin prices. His testimony was thus most important to the defendants, and damaging to the Government's theory that uniform,

arbitrary and non-competitive prices were maintained (R., pp. 451-452).

The following extract from the record shows the manner in which the rulings discussed in this point occurred and enables an estimate to be formed of their effect upon the jury (R., p. 453):

"Cross-examination by Mr. Podell:

My company is the manufacturing part of the J. L. Mott Iron Works. I was not in charge of the tile department. I can't tell you who had charge of that.

Q. You know that your concern pleaded guilty to a violation of this very law in this very court?

Mr. Marshall: I object to that.

A. I don't know anything about that at all.

Q. The J. L. Mott Company? A. The J. L. Mott Company have no tile department.

Q. The J. L. Mott Iron Works? A. That may be.

Q. That is your concern, is it not?

Mr. Marshall: I object to the question and move to strike out the answer, and ask the court to instruct the jury to disregard it on the ground that it is improper; that it tends to create prejudice, that it does not affect in any way the witness on the stand, and that it is incompetent, irrelevant and immaterial, and I ask your Honor to instruct the jury to disregard it.

The Court: What is your theory in asking that, Mr. Podell?

Mr. Podell: Purely as affecting the credibility of this witness and the business conducted by his company, to which he has testified. I think we have an absolute right to show the previous history of the concern that this man is connected with.

The Court: I do not think there is any doubt about that, if it is a transaction that affects the concern.

* * * * * *

The Court: Was this one of the concerns that pleaded guilty before me?

Mr. Podell: Yes, your Honor——

The Court: The name is familiar, but I do not remember.

The Witness: May I interrupt your Honor——

Mr. Marshall: I want a ruling on my motion. The motion is that the jury be instructed to disregard all of this on the ground that it is improper to bring it before the jury; that it does not tend at all to affect the witness who is on the stand and on the ground it is unfair and tends to introduce prejudice and it is incompetent, irrelevant and immaterial and I ask your Honor to instruct the jury to disregard it.

* * * * * *

Mr. Marshall: Does your Honor then overrule my objection?

The Court: I have, yes.

Mr. Marshall: I ask your Honor to allow me to note an exception.

The Court: Certainly." (Italics ours.)

These erroneous rulings of the court were in the highest degree prejudicial. The questions were calculated to create in the minds of the jury the impression that Mr. Bantje was the employee of a corporation which had committed the very offense charged against the defendants and that he had been implicated in such offense; and to arouse against him all the hostility and distrust which is publicly directed against those who are involved in such transactions, and thus to lead the jury to disregard his testimony as to facts, which, had they been believed, would have tended to negative the inference of an agreement to fix prices which the prosecution asked the jury to draw from circumstantial evidence. Such was the avowed purpose of the questions.

While it has been held that the conviction of a witness of an infamous crime or one involving deceit or moral turpitude can be shown to affect his credibility this rule is strictly limited. The conviction must be that of the witness himself. Proof that the witness is a close blood relation of the persons convicted of crime is not admissible. *Lee* v. *State* (Ark. 1899), 50 S. W. 516. Nor is proof that the witness associated with evil companions. *People* v. *UnDong* (Cal. 1895), 39 Pacific, 12; *Miller* v. *Territory of Oklahoma* (C. C. A., 8th Circ., 1906), 149 Fed. 330. Proof that a witness was an

employee of a corporation that had pleaded guilty of an offense under the Sherman Act can certainly have no effect upon his credibility. The individual was testifying. It was his credibility, not that of his company, which was involved, although the Court stated a contrary view (R., p. 454, fols. 1360-1361).

The Government contends that the answer of the witness, that he did not know whether his concern pleaded guilty removed all danger of prejudice. It will be seen from the foregoing quotations from the Record that the Court invited the prosecuting attorney to state that the concern had pleaded guilty, and denied the motion of defendant's counsel to strike out the statement. It made no difference whether the witness knew the answer to the question or not.

The petitioner does not now argue that the questions were proper for the purpose of affecting the credibility of the witness, but instead contends that they were asked for the purpose of showing *bias* on the part of the witness. But at the trial no such ground was stated for allowing the question. On the contrary, when questioned by the trial court as to the purpose thereof, counsel for the Government said:

> "Purely as affecting the credibility of this witness" (R., p. 454, fol. 1360).

Having been offered for this purpose, and the jury having heard the trial court's ruling that it was proper for that purpose, together with the statement that the company in question had pleaded guilty before the trial court, they were undoubtedly led to believe that this might be considered as affecting the credibility of the witness, whose testimony, as the petitioner's brief admits, would tend to show that no price fixing agreement existed.

IV.

The trial court erred in permitting questions as to whether one Hanley had not been examined as a witness by the Lockwood Committee.

From opinion below:

"We note some minor points, as there may be a new trial. In the examination of witnesses there is great room for discretion on the part of both court and counsel. That of counsel is often and naturally clouded by a desire somehow or anyhow to advance his own case. It is the duty of the court to exercise its own discretion in keeping counsel within what ought to be the very plastic rules of evidence.

"There is no flat regulation of injurious immateriality or hearsay, and it would be a misfortune if there were one, yet both court and counsel must always run the risk of making a mistake in the degree of latitude exercised. We think mistake was made and error committed in some instances:

"The secretary of the Potters' Association was on the stand, and some mention had been made of one Hanley, who was an official of the Jobbers' Association, whereupon the prosecution asked the witness whether 'at or about that time you knew the Lockwood Committee was in session, and that this Mr. Hanley had been summoned as a witness and was being examined before that committee?' Over objection the witness answered that he did know from the newspapers that Hanley had been under fire" before said committee. Ordinarily this would be one of those incidents of trial sure to happen in the heat of examination, and of no importance at all. But the context shows that this mention of the Lockwood Committee was of design, the imputation or suggestion being that anyone who was under fire by that organization (a local investigating body that had attracted considerable attention in the building trades) was smirched by being attacked. This is a favorite and very modern

form of verbal assault, but it had no place in a criminal trial. We mention it because it is an illustration of how the same latitude of language or suggestion may be of no importance in one cause and of serious moment in another. In this case, in its essence an inquiry into statutory trade regulations, the suggestion that the man with whom the witness had had dealings was an unreliable person (to put it mildly) because he had been called as a witness before the Lockwood Committee was inadmissible and prejudicially erroneous."

The errors in question occurred during the examination of the witness Dyer. Counsel for the prosecution showed the witness a letter to refresh his recollection, which was not offered in evidence, but which was dated May 19th, 1921 (R., p. 192, fol. 575), and asked if at that date he knew that the Mr. Hanley (Secretary of the Greater New York Association of Jobbers), referred to in one of the Government Exhibits had been summoned as a witness and was being examined by the Lockwood Committee. This was objected to as wholly irrelevant and tending to promote prejudice (R., p. 189, fols. 566-7). The trial court stated that the question was proper to lay before the jury to show how it came about that twenty out of twenty-four companies were selling class "B" ware in the domestic market, and counsel for the prosecution stated that this was his purpose, saying (R., p. 190, fols. 568-9): "We want to show why there was that small minority just at that time." An exception was taken by the defendants to the court's ruling. The question was then repeated and was again objected to, and the objection was again overruled on the statement of counsel for the prosecution that he intended to follow it up by showing that Mr. Hanley's examination was publicly heralded in the newspapers and was a matter of common knowledge at the time, stating that the witness could testify as to this. Whereupon the witness answered that he did know that the Lockwood investigating committee had Mr. Hanley "under fire". He was then asked how long before May 19th he knew that Mr. Hanley was "under fire". An objection to this question

having been overruled, the witness replied that he had known it for from thirty to sixty days (R., pp. 191-3, fols. 573-577). In response to a later question he stated that he derived his information from the newspapers.

None of the defendants live in New York and there is no evidence that any of them read the New York newspapers. There is no evidence that any of the defendants knew that Mr. Hanley had been examined as a witness by the Lockwood Committee or was "under fire", nor that they had ever heard of Mr. Hanley prior to the meeting of April 5th, 1921, at which a communication (Govt.'s Ex. 148, R., p. 1077) from him was produced. There is no evidence as to why Mr. Hanley was examined as a witness or what subjects his testimony referred to. The only facts shown were that Mr. Dyer learned from the newspapers that Mr. Hanley had been examined as a witness before the Lockwood Committee some time between March 20th and April 20th, 1921. Yet the trial court stated and allowed counsel to state before the jury that the fact that Mr. Hanley was so examined showed why twenty out of twenty-four companies were selling class "B" goods in the domestic market. A more improper or more prejudicial incident can hardly be imagined. The questions and answers coupled with the statement of the counsel and the court could not have failed to give the jury the impression that the defendants knew of Mr. Hanley's examination by the Lockwood Committee, although there is no evidence of this fact, and that by reason of such knowledge they had in some undisclosed fashion modified their conduct. The impression upon the minds of the jurors undoubtedly was that Mr. Hanley had been examined and was "under fire" because of some improper conduct on his part and that there was some sinister connection between him and the defendants. These inferences were wholly unwarranted by any evidence in the case. The fact that Mr. Hanley was testifying before a legislative committee in New York on some unknown subject, of which fact the defendants were not shown to be aware, is so obviously irrelevant that it is difficult to see how anyone could seriously contend that the questions were proper.

It is doubtless obscure to the members of this Court, who may not have followed the history of local events in New York City during the last few years, why the Circuit Court of Appeals regarded the interjection of this fact into the record as a "verbal assault" which "had no place in a criminal trial". There was no proof in the record as to what the Lockwood Committee was. The Circuit Court of Appeals, however, took judicial notice of what it was, and of the fact that a person "under fire" by that committee was "smirched", and that the question conveyed the suggestion that such a person was "an unreliable person", "to put it mildly".

We fail to see what action the Government can ask this Court to take as to this ground of reversal. It surely cannot be denied that it was known to every one in New York that the Lockwood Committee had developed a shocking condition in the building industries, which was widely heralded in the press. It cannot be denied that to the gouging and extortion in the building trades disclosed by that committee was attributed the high rate of rents prevailing in the City of New York, and that wide-spread public indignation had been excited. The question addressed to the secretary of the defendants' trade association tending to couple him with one of these supposed extortioners, was based on the assumption by the Prosecuting Attorney that the jury understood its full significance; for no proof was offered by him in the case, or needed to be offered, as to what the Lockwood Committee was, or what facts it had developed.

The Circuit Court of Appeals has determined, on account of facts of which that court takes judicial knowledge, that interjection of questions tending to cause the jury to bracket in their minds the secretary of the defendants' association with a person "under fire" by the Lockwood Committee, was a ground for reversing the judgment. Whether that decision of the Circuit Court of Appeals is right or wrong depends on facts of which that court took judicial notice. If the revelations of the Lockwood Committee had worked up the public, including, presumably, the jury that tried this case,

to a state of furious indignation with everyone who was "under fire" by the Lockwood Committee, then the court was right in treating the unnecessary and unwarranted interjection of this evidence as a "verbal assault" which "had no place in a criminal trial" (R., p. 3705).

Is this court asked to decide that the Circuit Court of Appeals erred as to the facts of which it took judicial notice? The Government, surely, cannot contend that any court sitting outside of the City of New York should hold that a Federal Appellate Court sitting in that city does not know the public facts of which it assumes to take judicial notice and on which it bases a decision.

V.

The trial court erred in excluding the evidence of many witnesses to the effect that there was active competition between the defendants during the period covered by the indictment.

From opinion below:

> **"The other point to be noted is the treatment of testimony offered in respect of competition averred by defendants as existing between themselves during the period covered by indictment. Under the first count it was essential for the prosecution to prove the absence of competition, i. e., the exaction (in the language of the count) of 'non-competitive prices'. As is customary in conspiracy causes, one if not the main object of the prosecution was to show the absence of effective competition, and ask the jury to infer therefrom an agreement to bring about the proven course of business. It was of course incumbent upon the defense to show, if possible, the presence of actual competition in respect of prices. It seems to us that competition, even when limited to competition in price, is a word or phrase of very plain and simple meaning. It is not one that calls for expert knowledge or labored definition, yet, for example,**

a purchaser of the kind of goods manufactured by defendants was asked: 'Did you find any competition for your trade among these people?' and he was not permitted to answer, on the ground that 'competition is a conclusion which results from a certain course of dealing. That is for the jury to find out'. This is but illustrative of a long line of rulings. We think it clear that when a man is asked whether he had competition, encountered competition, entered competition or observed competition, any trader, indeed any man acquainted with the English language, knows what is meant, and such questions do not in the legal sense ask for 'conclusions'. Words, like coins, are more or less current, and so men are more or less acquainted with their significance: it is rather late in the history of Sherman Law litigation to treat the word 'competition' as even connoting or suggesting anything not known of all men."

One of the principal tasks of the jury was to determine the proper construction to be placed upon a large number of letters introduced, which the Government contended indicated a belief on the part of the writers that there existed an agreement or combination as to the fixing of prices to which all of the defendants were parties. The defendants contended that if these letters were read in the light of the surrounding circumstances, they indicated the precise contrary, and showed that there never had been any agreement or combination effected between the parties.

Such being the question of fact presented to the jury in regard to these letters, it became of the utmost consequence to find out what was actually done during these years by the defendants. That they could, had they wished, have established a uniform price and could have maintained it, is obvious. They had during the war maintained an absolutely uniform price in their sales to the Government of the United States, from which no one had been shown to have departed.

Under these circumstances it is plain that the defendants were entitled to the fullest opportunity to show by their customers that uniform and arbitrary prices were not in fact charged, and that throughout the period under investi-

gation the defendants had been in active competition as to prices with each other, and that this fact had been well known to all of their customers.

Under these circumstances, the most natural source of information as to whether the defendants were in a combination or in competition with each other was the purchasers of their output. Most of the defendants pursued the policy of selling to jobbers, and these jobbers were very numerous. It was very easy for either side to call for information from purchasers as to whether or not the defendants were in a combination or in competition.

This line of inquiry naturally presented itself to the mind of the prosecuting officers, and the record discloses that they called on at least two of the large jobbers for information on this point and were advised that there was active competition among the defendants (R., p. 423, fol. 1268; p. 426, fol. 1276; p. 428, fol. 1282; p. 495, fol. 1485; p. 529, fol. 1587; p. 532, fol. 1594).

The prosecuting officers, having learned that the defendants were actually in competition, dropped the inquiry among the purchasers of the output of the defendants, and attempted to prove a sort of theoretical agreement among the defendants to maintain prices which was actually, as they had learned, not observed by the defendants at all. The Government had learned that if any agreement had been made, it had never been carried out but was openly violated by all of the defendants and they attempted to prove a bald agreement which was in no sense effective in the trade.

It was not until the defendants' side of the case came to be presented that the court heard from their customers at all. The defendants called a long line of dealers who had dealt with the defendants and made purchases from them. The first of these, Smolka (R., p. 421, fol. 1261 *et seq.*) was permitted to testify fully, and his evidence showed convincingly that during this whole period he had found active competition and price cutting among the defendants.

This testimony was highly damaging to the Government's

case, and when the next witness, Mr. Efron, was called the Prosecuting Attorney practically shut his testimony off by obtaining a ruling from the Court, over the exception of the defendants, that the witness could not testify to the existence of competition among the defendants on the ground that the testimony embodied a conclusion (R., p. 434, fol. 1301; p. 436, fol. 1307).

Many erroneous rulings along the same line were made by the trial court, over the exception of the defendants, as follows:

1. The court refused to allow counsel for the defendants to ask Philip J. Faherty, who had been in the pottery business for twenty years, fourteen of which he had been with the Lambertville Pottery Co. (R., p. 339, fol. 1016), the following question:

> "Can you state whether or not you found yourself in competition with other members of the Association at any time?"

on the ground that the question was a vague, broad generalization calling for conclusions and not specific facts (R., p. 344, fols. 1031-2; assignment No. 119, p. 3642).

2. It refused to allow the witness, Robert T. Shannon, who sold the goods of the Acme Sanitary Pottery Co. (R., p. 394, fol. 1182) to be asked:

> "I ask you whether you found yourself in active competition in your efforts to push this product?"

upon the ground that it called for a conclusion and was vague, indefinite and uncertain (R., p. 398, fols. 1191-2).

3. It refused to allow the witness, Jacob Efron, a jobber of twenty-two years' standing, who bought pottery from nine of the defendants (R., pp. 434-6, fols. 1301-1306) to be asked:

> "Did you find any competition for your trade among these people?"

on the ground that it called for a conclusion (R., p. 436, fol. 1307).

4. It sustained an objection to the following question addressed to Walter F. Drugan, who was active as salesman of Cochran-Drugan & Company for fourteen years (R., p. 440, fol. 1320), and who testified that in selling the products of that company he met with competition (R., p. 441, fol. 1323):

> "Please state whether or not you cut your prices to meet that competition?"

and struck out the witness' answer that in some cases he did so, upon the ground that the question called for the conclusion of the witness as to several transactions which were not identified, and was vague, indefinite and uncertain.

5. It sustained an objection to the following questions addressed to Jerome L. Weil, a wholesale and retail dealer who bought from three of the defendants (R., p. 465, fol. 1395):

> "Can you state whether or not there were instances where there was a cutting of prices to get your business?"

(R., p. 469, fol. 1406), and

> 6. "Can you state whether the price that you paid for the articles that you bought were more at or more below the prices stated on those price bulletins?"

(R., p. 466, fol. 1397), upon the ground that the questions were vague, indefinite and uncertain.

7. It sustained an objection to the following question addressed to Jerome W. Thorndike, president of a large Boston jobbing house, who bought pottery from eleven of the defendants (R., pp. 511-512, fols. 1533-4):

> "As compared with the times you paid the bulletin prices which was the most frequent, the purchases at or below the bulletin prices?"

upon the ground that it called for the conclusion of the witness as to a mass of transactions covering several years and that it afforded no proper basis for cross-examination (R., p. 512, fol. 1535).

8. It sustained an objection, the ground of which was not stated, to the following question addressed to the witness John F. Smith, Treasurer of the Resolute Pottery Company, who had testified that his company made sales below its bulletin prices (R., p. 375, fol. 1123):

> "How much cutting of your prices did you notice and how frequent were the cuts?"

the judge saying that the question was excluded because the witness was asked to state something in a general way that he ought to show by his records (R., p. 376, fol. 1126).

9. It excluded the following question addressed to the witness Charles J. Kirk:

> "Did you not from time to time, Mr. Kirk, hear of other members of the Association who were cutting prices besides the Abingdon?"

on the ground that it was too vague, general and uncertain to afford any basis for cross-examination (R., p. 474, fol. 1420).

10. A similar objection was sustained to the following question addressed to Jerome L. Weil, who testified that he procured prices from several companies (R., pp. 466-7, fols. 1398-9):

> "Were those prices the same or did they differ?"

because it was vague, and general, affording no basis for cross-examination (R., p. 467, fol. 1401).

11. It also excluded the following question addressed to Robert P. Seifert, who stated that in purchasing it was usual for him to get three or four different bids or prices from different manufacturers:

> "How wide a range can you remember it as having taken?"

because the witness could not refer to specific instances (R., p. 525, fol. 1575).

12. It excluded the following question addressed to Edmund F. Winzinger, who purchased pottery from four of the defendants:

> "Will you please state whether you observed any uniformity of prices at the time you were making purchases?"

upon the ground that it called for a conclusion of the witness (R., p. 497, fol. 1491).

13. It sustained an objection to the following question addressed to Aaron Buda, a large jobber who dealt with fourteen of the defendants (R., p. 491, fols. 1471-2):

> "And now tell me the way you purchased your goods?"

upon the ground that the witness should be confined to specific instances (R., p. 493, fol. 1478).

The questions above referred to fall into five groups. Nos. 1, 2 and 3 inquire as to the existence of competition. Nos. 4, 5, 8 and 9 inquire as to the cutting of prices. Nos. 6 and 7 inquire whether more sales were made at or below the bulletin prices. Nos. 10, 11 and 12 inquire as to the uniformity of selling prices. No. 13 inquires as to the customary way of purchasing pottery.

The importance, in a case like this, of such evidence can hardly be exaggerated. The defendants were charged with fixing a uniform price, at which they actually sold, and of refraining from competition as to price, all pursuant to agreement. The jury was asked to infer such an agreement from circumstantial evidence. If the jury had found that the defendants did not sell at uniform prices, but competed with each other, cutting their prices to meet competition, and that many more sales were made below the bulletin prices (which the Government apparently contended were the "uniform, arbitrary and non-competitive prices") than were made at such prices, they might also have found that the customary way of doing business was for buyers to procure bids from a

number of defendants, and that the prices so obtained were not the same, but varied widely. Had they found that these things were true they might well have reached the conclusion that whatever the relations between the defendants may have been they effected no restriction upon competition or restraint upon trade; that the defendants never attempted or intended to fix prices and suppress competition; and that the alleged agreement, which is the foundation of the case against them, did not in fact exist. Such a finding would have changed the interpretation of the whole body of documentary evidence. If the documents are considered in connection with the continued existence of competition and a wide variation in prices they indicate no more than that some of the defendants were making recommendations which any of them might follow or disregard as they saw fit and which most of them entirely disregarded. Who can say that had the testimony, which the Court excluded, been submitted to the jury, it might not have furnished the additional weight of evidence which would have compelled their belief.

The court did not deny the relevancy of testimony of the character offered, but excluded it upon the ground that the questions called for conclusions; were vague, indefinite and uncertain, affording no basis for cross-examination, and because in its opinion price cutting and variation of prices could not be shown except by records or specific instances.

There is no force in the objection that the questions were too vague to afford a proper basis for cross-examination. Competition is not a vague, broad generalization, but a definite thing; whether prices were cut to procure orders, and whether the greater number of a given individual's purchases were made at or below bulletin prices are likewise facts. While the questions undoubtedly call upon the witnesses to give testimony which involve the exercise on their part of a certain measure of opinion or conclusion from facts personally observed by them, this does not render the testimony inadmissible either because it is a conclusion or opinion, or because it affords no basis for cross-examination. All

of the witnesses whose testimony was thus excluded had been in the business of buying or selling sanitary pottery for many years. All of them were qualified as experts with respect to the matters as to which they were examined, and even if this were not so their testimony would still have been admissible.

The so called "opinion rule" has been the subject of much misunderstanding, and the cases dealing with it are conflicting. The correct rule supported by the weight of authority does not exclude the testimony of the witnesses even though they are not of the class generally recognized as experts where they testify to conclusions from facts observed by them in cases where it is impossible to state the facts fully to the jury, or where to do so would tend to confuse the jury.

In *Greenleaf on Evidence* (16th Edition), Vol. 1, page 550, it is said:

> "Thus in practice, opinions are received * * * Secondly, From persons who have no special skill, but have personally observed the matter in issue and cannot adequately state or recite the data so fully and accurately as to put the jury completely in the witness' place and enable them equally well to draw the inference."

In *Wigmore on Evidence* (2nd edition), section 1917, Vol. 4, page 104, it is said:

> "When an ordinary or lay witness took the stand, equipped with personal acquaintance with the affairs and, therefore, competent in his sources of knowledge, the circumstance that incidentally he drew inferences from his observed data and expressed conclusions upon them did not present itself as in any way improper."

The same authority also says, *Ibid* (section 1922) Vol. 4, pages 117-118:

> "There is no principle and no orthodox practice which requires a witness having personal observation to state in advance all his observed data before he states his inferences from them; all that needs to appear in

advance is that he had an opportunity to observe and did observe, whereupon it is proper for him to state his conclusions, leaving the detailed grounds to be drawn out on cross-examination."

The rule laid down by Mr. Wigmore is amply supported by the authorities. *Commonwealth* v. *Sturtivant* (1875), 117 Mass. 122, 123; *Schultz* v. *Frankfort, etc., Insurance Company* (Wis. 1913), 139 N. W. 386-391; *Railroad Company* v. *Schultz* (1885), 43 Ohio St. 270, 282; *Atwater* v. *Clancy* (1871), 107 Mass. 369, 376; *Parker* v. *Boston & Hingham Steamboat Company* (1872), 109 Mass. 449-451. The rule is well stated in *Mobile J. & K. C. R. Co.* v. *Hawkins* (Ala. 1909), 51 S. 37. The witness there was asked whether one of the parties did not at a certain conversation withdraw his claim of authority. In discussing the admissibility of the evidence the court said:

> "A witness may state a conclusion of fact; he is not required to state every fact separately from every other fact; he may state facts either separately or collectively. It is conclusions of law that he may not attempt to state; nor will he be allowed to draw a conclusion, or to state a conclusion which is to be drawn from several other facts—that would be the province of the jury; but it is not only permissible for a witness to sometimes state a conclusion as to a fact, but often absolutely necessary that he do so, if he testify at all relative to the fact. The rule prohibits merely the drawing or stating of conclusions of law, which are questions for the court, and of certain conclusions of fact which, under the issues and the evidence, are exclusively questions for the jury, and to be determined from all the other facts or evidence in the case. These conclusions of fact are denominated by our court 'shorthand rendering of facts', to distinguish them from mere gratuitous opinions, motives, and conjectures of the witness. A witness may testify that certain work was done in a workmanlike manner, that he controlled land for a certain person, that a person's character is good or bad, that a person seemed to be suffering, etc. 3 Mayfield's Dig. p. 468, *et seq.*, which collects the authorities" (p. 43).

The rule has repeatedly been recognized by the Federal Courts.

Connecticut Mutual Life Insurance Company v. *Lathrop*, 111 U. S. 612, 620-621;
Hopt v. *Utah*, 120 U. S. 430, 437-8;
Gulf C. & S. F. R. Co. v. *Washington* (C. C. A., 8th Circ., 1892), 49 Fed. 347-349;
Baltimore & Ohio R. Co. v. *Rambo* (C. C. A., 6th Circ., 1893), 59 Fed. 75-77;
City of Charlotte v. *Atlantic Bitulithic Company* (C. C. A., 4th Circ., 1915), 228 Fed. 456, 459-460.

While there are cases which question or deny the rule established by the above authorities they proceed upon a misunderstanding of the "opinion rule" as originally established and result in a situation which has been found intolerable in practice. As Mr. Wigmore says (*Wigmore on Evidence*, 2nd edition, section 1929, Vol. 4, p. 124):

> "The opinion rule day by day exhibits its unpractical subtlety and its useless refinement of logic. Under this rule we accomplish little by enforcing it and we should do no harm if we dispensed with it * * * We should do no harm, because, even when the final opinion or inference is admitted, the inference amounts in force usually to nothing unless it appears to be solidly based on satisfactory data, the existence and quality of which we can always bring out, if desirable, on cross-examination."

To say, that a dealer in pottery cannot testify as to whether he purchased more goods below bulletin prices than at such prices because he cannot recall each specific transaction, is as illogical, as to say that a railroad conductor cannot testify that he collects more tickets than cash fares unless he can recall each particular transaction.

The prejudicial effect of excluding the testimony in question does not admit of any doubt. Testimony of the character here offered was one of the decisive factors in the *Steel*

case, where two hundred witnesses gave testimony of this character (*U. S.* v. *U. S. Steel Corporation*, 251 U. S. 417-448). The Government cannot successfully contend that the exclusions of this testimony was not prejudicial, in view of the fact that the jury was asked to infer, and did infer, from circumstantial evidence the existence of a restraint of trade, although the Government called not a single witness to prove either that prices were excessive to the detriment of the purchasing public, or that prices were ever fixed at figures unreasonably low for the purpose of injuring competitors or forcing them out of the trade, or that competition as to prices had been eliminated or even diminished.

The rulings of the trial court, if adhered to, would have made it impossible for the defendants to have the actual picture presented to the jury. Had the books of each jobber been produced in court, had the men who made the entries and the agents who made the purchases, called to substantiate them, still the whole picture would not have been presented, for the records would only have shown the one offer accepted, and not the five or six competitive offers which were rejected during the negotiations.

The stipulation entered into at the trial and the evidence offered thereunder does not cure the error of rejecting the testimony in question. In the first place, no documentary evidence of that character, particularly when compiled from the defendants' records, could have the same effect as the actual testimony of witnesses—particularly of witnesses in no wise connected with the defendants or employed by them. In the second place, the stipulation was not entered into until *after* all of the testimony referred to had been excluded, and its purpose was not merely to avoid the necessity of introducing the evidence already improperly excluded, but to attempt to avoid the burden, imposed by the erroneous ruling. Under the rulings complained of, a jobber, to prove that when he wanted to buy he procured offers at different prices from different defendants, would have been required to prove each specific offer. Obviously there would be no record on his

books of the rejected offers, but only of the purchases which resulted from the acceptance of the successful offer; yet he might have a very clear recollection that at the time of a particular purchase, or that whenever he made a purchase, he procured numerous offers from different defendants at different prices, although not able to give the details as to each or any of the rejected offers.

There is no force in the petitioner's argument that the competition referred to in the questions excluded was not "competition as to price". The questions quoted as numbers 4 to 12, both inclusive, specifically refer to *competition as to price;* an examination of the context will show that the other questions must have been understood as referring to competition as to price.

The exclusion of the evidence offered was error the prejudicial effect of which can hardly be overestimated.

VI.

The denial of the motion in arrest of judgment on the first count of the indictment was error.

Among the objections to this count raised by the motion in arrest are:

(*a*) That the first count of the indictment does not state a crime (Rec., p. 732, fols. 2195-96); and

(*b*) That it was so vague and indefinite that it fails to advise the defendants of the charge against them (R., p. 732, fol. 2196).

(*a*) If the rule of reason is applicable to criminal prosecutions under the Sherman Act and the fact of unreasonableness is an element of the crime, it follows that an indictment should allege facts showing this, as well as other necessary

elements. It should allege facts which *must* constitute a crime, not merely facts which, *under certain circumstances not alleged, may do so.*

The first count is defective in this respect. It alleges merely that pursuant to agreement prices were fixed and competition as to prices restricted. There is no indication in this count that the alleged combination brought about any prices different from those which would have existed in the absence of any combination at all. There is no statement of any facts peculiar to the business in which it is alleged the restraint occurred; no account of the condition of the business before and after the alleged restraint, and no statement of the effect of the alleged restraint actual or probable; nor is there any statement in this count of the history of the restraint, the evil believed to exist, or the reason for adopting the alleged restraint.

The mere fact that prices are regulated or affected is not sufficient to render a combination unlawful (*U. S.* v. *John Reardon & Sons*, 191 Fed. 454; *United States* v. *Whiting*, 212 Fed. 466); nor is the fact that competition is restricted sufficient (*United States* v. *John Reardon & Sons, supra*, and *United States* v. *Chicago Board of Trade*, 246 U. S. 231).

If the law is as stated in the charges of Judge Grubb in the *Aileen Coal* case (footnote, *ante*, p. 35) and Judge Knox in the *Atlas Cement Company* case (footnote *ante*, p. 37) a mere allegation of price-fixing in an indictment, without more, does not charge a crime, and the first count of the indictment is insufficient.

The first count is also insufficient if tested by the rule laid down in the *Chicago Board of Trade* case, *supra*, and the recent case of *National Association of Window Glass Manufacturers* v. *United States*, 263 U. S. 403. When this count is examined, it will be observed that in spite of the decision in the *Chicago Board of Trade* case, the pleader undertakes to adopt the "simple test" which was there held insufficient, and to rest his whole case on the mere proposi-

tion that a charge of restraining trade is in and of itself a sufficient charge of violating the Sherman Law.

The first count is experimental, in that it is the first indictment ever brought to trial that does not allege any unreasonable restraint or any injury to the public.

Copies of all indictments returned under the Sherman Act are preserved in Washington and were accessible to both parties. Prior to the trial, the defendants caused an examination of these indictments to be made, and at the trial handed to the court and counsel for the prosecution a printed pamphlet containing a collection of quotations from every indictment under the Sherman Act since 1909 which had any relation to price-fixing. All but two of these indictments stated some fact from which the inference of an unreasonable or undue combination could be drawn. Prices were alleged to be "excessive", "exorbitant", etc., or sellers were charged with combining to fix "minimum" prices, or buyers with combining to fix "maximum" prices, or there were other allegations of fact indicating injury to the public or unreasonableness, not present in the first count of the present indictment. To the only two indictments that were drawn along the lines of the first count of the present indictment and in which mere price-fixing without more was charged, demurrers were sustained, though they did not rest on the ground which we are now discussing, and therefore, these two never came to trial.

Under the first count of the present indictment the most reasonable and patriotic combination to lower prices in times of public emergency would be a crime. That such is not the case has, we think, been demonstrated.

The fact that, under the first count of the indictment, the pleader does not make any of what may be called the standardized allegation in Sherman Act indictments, of enhancement of prices, or other facts showing injury to the public, is thrown into bold relief by the way in which this subject is dealt with in the second count. There the allegation is distinctly made that, by means of the alleged conspiracy

described in that count, the defendants compelled the consumers to pay "additional sums and increased prices" (R., p. 14, fol. 40). Although this allegation was not proved, its presence in the second count prevents the making against that count of the point which we are here urging against the first count.

(*b*) As to the objection of vagueness and indefiniteness. Two of the principal reasons for requiring precision and definiteness in an indictment are (1) to apprise the defendant of the exact charge against him; and (2) to enable the defendant, in case of another prosecution to plead his conviction or acquittal in bar of the second prosecution.

The maintenance of arbitrary and uniform prices by the defendants, standing alone, is no crime; but may be a constituent part of either one of two different and unrelated offenses under the Sherman Act.

(1) It may be part of a plan directed against the public with a view to forcing the public to pay higher prices.

(2) It may be part of a conspiracy against the persons controlling the remaining fifteen per cent. of the business, with a view to driving them out of business and securing a monopoly.

There is no allegation in the indictment as to the identity of the persons against whom the combination was directed—whether it was aimed on the one hand at the pubilc, or, on the other hand, at the fifteen per cent. of outside competitors.

To illustrate this thought, let us state the substance of the indictment, as it now stands, as an incomplete sentence:

> "The defendants, who controlled 85% of their industry, and were engaged in interstate commerce, combined to maintain uniform arbitrary and non-competitive prices——"

Now let us add:

> (1) "which prices were unreasonably high, excessive and exorbitant, with intent to injure and oppress the consumers"

or

(2) "which prices were unreasonably low, with intent to ruin and drive out of business the persons and corporations who controlled the remaining 15% of the industry."

The sentence, finished in either of the ways above suggested, would state a crime under the law. There is nothing in the indictment in conflict with either conclusion of the sentence. Standing unfinished as it does in the indictment it states a course of conduct which may be entirely innocent.

That is to say, under such an indictment as the present one, when the trial begins, the prosecutor would apparently be at liberty to prove that the uniform, arbitrary and non-competitive prices were fixed at a figure unreasonably high, to the detriment of the purchaser; or at a figure below the cost of manufacture, and that the way in which it was intended to restrain trade was to drive the other fifteen per cent. out of the business, and that the gist of the offense charged by the indictment was cut-throat competition, directed against the remaining fifteen per cent. of the industry.

If he should decide to use this vague indictment for the purpose first named above, his proof would be that the uniform prices were high; if he should decide to use the indictment for the second purpose, his proof would be that the uniform prices were low.

In either event, he would be in position to claim that his general charge of a combination in restraint of trade enabled him to prove either of the two different violations of the Sherman Act suggested above.

In like manner, should a defendant be either acquitted or convicted under this indictment and should be reindicted and plead this indictment in bar, it would be open to the Government to adopt either of the constructions of the indictment above suggested.

Consequently, no defendant was apprised by the indictment as to which of these two offenses he had to meet; nor is a defendant convicted or acquitted under this indictment given complete protection from another prosecution.

VII.

The second count of the indictment was submitted to the jury on an incorrect statement of its meaning and effect. The motion to direct a verdict of not guilty as to this count should have been granted.

(*a*) The Sherman Act is a statute, the words of which do not define all the elements of the offense, and, therefore, an indictment under it must allege the specific acts and particular facts which are alleged to have been done by the defendants. *In re Greene* (C. C. S. D. Ohio, 1892), 52 Fed. 104, 111. The indictment charges that the defendants by common and concerted action "limited and confined their sales of sanitary pottery to a special group selected by said defendants by agreement and known and denominated *by them* as 'legitimate jobbers' " (R., p. 12, fol. 35).

Every word in the portion of the indictment just quoted conveys the thought that the persons to whom the defendants are charged with limiting and confining their sales were a definite set of individuals. The "group" is said to be "special". The "special group" is charged to have been "selected" by the defendants. The selection is said to have been the result of "agreement". The persons thus "selected" are said to have been given a name by which they were known to the defendants.

Each of the significant words here appearing has a well recognized meaning:

Part of the definition of the word "special" in Funk & Wagnall's New Standard Dictionary is "Pertaining to one or more individuals *as distinguished from the class to which they belong*" (italics ours).

By no possibility can this language be taken to designate jobbers as a class. The class of persons who go into the jobbing business is continually fluctuating. The persons who

go into this business are not "selected" by the defendants. The defendants made no "agreement" as to who shall or shall not belong to the class of jobbers.

The court refused to grant the defendants' request to charge as follows:

> "56. Even though the jury should find that the defendants or some of them by combination or agreement confined their sales to jobbers as a class, they may not convict under the second count of the indictment for the reason that the indictment does not charge an agreement to deal with jobbers as such, but charges an agreement to deal only with a special group selected by agreement by the defendants."

This request is typical of a group of requests that were refused (Numbers 54-59, both inclusive; R., pp. 683-4, fols. 2048-2052), due exception being taken.

Instead, the court charged the jury that an agreement to confine sales to jobbers as a class would constitute guilt under the second count.

The refusal of the court to charge as requested and the charge actually delivered by it, constitute a departure from the allegations of the indictment and informed the defendants for the first time, after all of the evidence was in, that they were on trial, not for agreeing to confine their sales to a special group selected by them, but for agreeing to confine them to a general class of which anyone could become a member at will, and without regard to any "selection" or "agreement" by defendants. There was such a material difference between the allegations of the second count and the facts laid down by the court as sufficient to constitute the crime there alleged, that the refusal of the request, in question was, we submit, reversible error. Had the indictment, instead of referring to a special group, named its members and charged an agreement to confine their sales to A, B, C and D, no one could doubt the error of the charge in question; but there is as much difference between a special group

arbitrarily selected and a general class as there is between enumerated individuals and a general class.

Upon the trial, there was no "special group" identified in any way as that referred to in the second count, but the proof amounted, when it is all summed up, to the fact that many of the defendants marketed their output through jobbers as a class. This, of necessity, required them to refuse jobbers' prices to plumbers and builders who are, so to speak, the retailers in this business. Such of them as dealt with jobbers had to exercise care that they did not sell at jobbers' prices to the retail trade; for if they did they could never have kept their jobbers. Many inquiries, therefore, appear in the evidence as to whether a proposed purchaser is or is not a legitimate jobber (which means an actual jobber) and thus entitled to jobbers' prices, and these inquiries came from such of the defendants as dealt in any given territory with jobbers only.

The language of the indictment was calculated to and did lead the defendants to suppose that they were not charged with having adopted the policy of marketing their product through jobbers, but with having by some agreement established a special group to whom they limited their sales.

It is quite evident that, when this indictment was drawn, it was the theory of the prosecution that the defendants had in fact selected by agreement some special group of jobbers to whom their sales were to be limited. Early in the case the Government proved that the Secretary of the Sanitary Potters Association kept a list of jobbers which he consulted when inquiries were made by members of the association, who dealt with jobbers, to ascertain whether a new customer was or was not a legitimate jobber (R., pp. 59-60, fols. 177, 178). The prosecution also proved by the same witness the existence of the so-called Eastern Supply Association, which was an association of jobbers and manufacturers (R., p. 60, fols. 179, 180). The prosecution endeavored to prove by the quotation clerk of the Trenton Potteries Company (R., p. 259, fol. 776) that there was, as to the jobbers he dealt with,

a "certain well defined group that you can tell the description of" (R., p. 263, fol. 787). The witness, however, merely stated that he had dealt with jobbers that had been his customers before, and when a new concern came in and requested prices, it was investigated (R., p. 263, fol. 789).

It would seem to be apparent from these questions and from the language of the indictment that at the outset it was the theory of the prosecution that the defendants had had an agreement to boycott all jobbers except the special group either on Mr. Dyer's list of jobbers or the group in the jobbers' association. It was only after the failure of the prosecution to prove the existence of any "special group selected by the defendants" that the theory of the prosecution was changed to a charge that the defendants dealt with jobbers as a class.

There is no proof in this case that the defendants attempted in any way to limit the opportunity of any trader to become a jobber. It is shown that in this business, the jobbers' contribution to the distribution of the output consists of assembling the products of manufacturers in many lines, such as brassware, enameled iron, etc., as well as pottery; assuming part of the transportation (R., p. 427, fol. 1281); investigating credit risks, and giving the retailer or plumber time to pay and sometimes making advances to the plumbers until they get money from the jobs out of which to pay for the material purchased (R., p. 432, fol. 1296); that they carry the job until some payment comes to the plumber out of which he can pay.

The jobber, in other words, does in this trade what he does in others, assembles many lines of merchandise, assumes all credit risks and certain transportation charges, and also purchases in large quantities, and thus stabilizes the distribution of the product. His contribution to distributing the output of the factories is real and it has never been denied that he is entitled to have a concession made to him in prices to compensate him for his services in the distribution of the product.

(*b*) The court charged the jury as to the second count to the effect that the Government contended that there was an understanding reached or agreement made "or *policy* determined upon" that no sales should be made directly to owners of property, builders or architects or plumbers (R., p. 702, fol. 2106). This contention is not in accordance with the indictment. The refusal to deal with certain classes is not the confining of sales to a "special group". Having thus defined the contention of the Government, it charged the jury:

> "The statute, however, condemns the adoption of any policy, agreement or understanding on the part of a group of manufacturers in control of a substantial part of an industry to confine its sales to any class to the exclusion of others" (R., p. 703, fol. 2108).

To these portions of the charge, the defendants excepted (R., p. 724, fol. 2171).

The court here imports into the Sherman Act a new and very far reaching addition. It is a matter of common knowledge that it is the policy or practice of most—if not all of the large manufacturers—to market their product through jobbers. Such a course of business is necessary unless the manufacturer is prepared to set up a selling department which will take care of credit risks and distribution at distant points and in communities where the manufacturer may be a stranger.

It is also a matter of common knowledge that when a manufacturer adopts this plan of distribution, he cannot do it without giving the jobber a profit for his share in the work of distribution. He cannot sell in the same territory to jobbers at a price and give the same price to the retailers who are customers of those jobbers.

The Secretary of the Sanitary Potters' Association stated (R., p. 68, fol. 203) that it was the settled policy of the manufacturers of pottery to sell to the jobbing trade. If the secretary of any other large trade association in any other line of business were asked the same question, he would probably

make the same answer. The adoption of this policy of distribution cannot by any stretch of language be deemed a violation of the Sherman Law. When the court added to the words "understanding and agreement" the further word "policy" in the disjunctive (R., p. 703, fol. 2108), and told the jury that the adoption of a policy was condemned to the same extent as the making of an agreement or the reaching of an understanding, it enlarged the penal provisions of the law far beyond any point to which they have yet gone.

If the jury had concluded, what is undoubtedly the fact, that the great majority of the defendants had adopted the policy of selling to jobbers, they must have understood from this charge of the court that such conduct on the part of the defendants was condemned by the law.

If the defendants at one of their meetings had passed a written resolution to the effect that good business policy dictated distribution through jobbers and this resolution had been unanimously carried at a meeting where all of the defendants were present, the language of the court's charge would have made their conduct a crime.

The word "policy" conveys to the mind the idea of a course of conduct adopted because deemed advantageous and reasonable and not because of any agreement to adopt it. Nevertheless, persons adopting a policy in such a frame of mind are under the condemnation of the law as interpreted by the Court.

If any manufacturer on a large scale who belongs to a trade organization in this country were called upon to answer the question: "Has your organization adopted the policy of dealing with jobbers?" his answer would be "Yes"; but, if asked "Are the members of your organization bound by any agreement or understanding that they would deal only with jobbers?" his answer would probably be that such matters are left for individual determination. However, his answer in the affirmative to the first question would render him guilty of a violation under the charge in the present case, although the truth of his negative answer to the second question was admitted.

The court in its charge twice emphasized the error of which we now complain. It specified the three alternative charges of the government, that there had been an *understanding* reached or an *agreement* made or a *policy* determined upon (R., p. 702, fol. 2106), and after doing so, told the jury that if they found that any one of these three things had occurred, the defendants came under the condemnation of the statute (R., p. 703, fol. 2108).

The rest of the charge on the subject must have driven home in the minds of the jury the error of which we now complain. After stating that the law condemned all of the three things specified, namely, a policy, agreement or an understanding, the court said (R., p. 703, fol. 2109):

> "If, therefore, you find from all the evidence bearing on the subject some promise, either express or implied, or any assent to the proposition that the defendants should conform their conduct to some prescribed rule the aim and purpose of which was to restrict their sales to jobbers only, then under the law the defendants are guilty of a combination and conspiracy to restrain trade."

This language must have conveyed to the minds of the jury that a man who made a promise, express or implied, was guilty and that a man who attended a meeting where a proposition was announced that it was good policy to confine sales to jobbers and who in his own mind assented to that proposition without so advising any one else, was equally guilty.

In *Jayne* v. *Loder* (C. C. A., 3rd Cir., 1906), 149 Fed. 21, it was held that a common policy is not necessarily a combination and that if one decides upon a policy, the fact that others make the same decision does not constitute a conspiracy. The court there considered a policy which was found to have been the result of an agreement to the observance of which the members were bound and for the enforcement of which disciplinary and coercive measures were provided. This feature was lacking in the case here, there being no direct evidence of anything more than the recommenda-

tion of a common policy from which the defendants were free to depart if they saw fit, and there are some of them who did in fact depart from it (*ante,* pp. 12, 16). The arrangement found to exist in *Jayne* v. *Loder* was held to be illegal, but the court in that case expressly recognized the fact that a common plan or policy is not necessarily unlawful, saying (p. 27):

> "It is true that a common plan or policy does not necessarily mean a combined one. The individual manufacturer or proprietor may be persuaded, for example, that the retailer or jobber who cuts the medicines of his neighbor today will likely cut his medicines tomorrow, and so decide not to sell him; and it will not make out a conspiracy that others are of the same mind."

U. S. v. *Southern Wholesale Grocers Association* (D. C., N. D. Ala. 1913), 207 Fed. 434.

The combination considered by Judge Grubb in the case last cited went much further than did the defendants here. While the Sanitary Potters' Association's secretary stated that its settled policy was to sell only to jobbers, this policy was not followed by all of its members; the Abingdon Sanitary Manufacturing Company selling direct to plumbers, as did the National Helfrich Pottery Company through the Peerless Selling Company. The John Douglas Company, a member of the association, also sold direct to plumbers. These members never appear to have been criticized for departing from the policy of distribution through jobbers.

No steps were ever taken to coerce them in any way, nor was any attempt ever made to drop them from the association. The jury may well have found that the inquiries made by members of the association as to whether particular concerns were jobbers and the replies thereto were merely the exchanging of information to enable the defendants making such inquiries to follow a policy, which, while common to most of the defendants, was not common to all, and which

was not the result of any agreement, but which was at most the result of following recommendations or expressions of opinion which all were free to disregard if they saw fit and which some did disregard. Had the jury found this, their verdict under the charge excepted to could not have been other than guilty in the second count. Had the portion of the charge excepted to been omitted and had the court instead charged the defendants' 34th, 35th and 36th requests (R., pp. 3669-3671, fols. 11007-11011), the verdict would probably have been otherwise.

(*c*) The Court charged the jury (R., p. 703, fol. 2107):

> "You should not concern yourselves with the question whether in the absence of such an agreement the defendants nevertheless would have restricted their sales to jobbers, nor are you to inquire whether it is a commendable or usual trade practice."

To this portion of the charge the defendants excepted on the ground that the inquiry which the trial court forbade the jury to make ought to be made by the jury (R., p. 724, fols. 2171, 2172; Assignment of Error No. 236; p. 3688).

This exception illustrates sharply the length to which the trial court was driven by the inexorable rule it had laid down for itself that no excuse could be offered for any combination, agreement, conspiracy or policy among manufacturers. Every member of the jury doubtless knew that whether there had or had not been a combination, most of, if not all of these defendants would under business conditions in this country have been obliged to market their products through jobbers. They were told that they must not concern themselves with this knowledge, and that though this might be a commendable trade practice, it was a violation of law for the defendants to agree to enter into it or even to assent to the proposition that it was a good business policy. The court's logical pursuit of its determination that the "rule of reason" has no application to a criminal case apparently

required it to charge the jury that it was undue and unreasonable for people in like circumstances to approve of the same policy whether they make agreements or not.

(*d*) Inasmuch as there was absolutely no evidence to support the charge that the defendants "selected by agreement" a "special group" to whom they "limited and confined their sales", as charged in the second count of the indictment, it follows that it was error for the court to deny the defendants' motion to direct a verdict of not guilty as to the second count (R., p. 663), and the defendants' exception to the denial of such motion to direct (R., p. 665) raises a point requiring a reversal of the judgment.

In the Government's brief little effort is made to defend the conviction of the defendants under the second count. If that count was tried under entirely erroneous instructions, and if evidence relating to that count was improperly excluded, and if, as a matter of fact, the motion to direct a verdict in favor of the defendants as to that count should have been granted, the consequence is that the conviction on both counts should be reversed. *Graves* v. *U. S.*, 165 U. S. 323; *People* v. *Van Zile*, 143 N. Y. 368; *People* v. *Werblow*, 241 N. Y. 55, at p. 69; *State* v. *McCaless*, 9 Iredell (N. C.) 375.

VIII.

The trial court erred in refusing the various requests of the defendants to instruct the jury that they could not be convicted unless they had entered into an agreement in some way imposing upon themselves an obligation, and in excluding evidence along this line.

(*a*) It is said in the case of the *United States* v. *Piowaty*, 251 Fed. Rep., 375, at page 377:

> "In my opinion, unlawful agreement is the essence of the offense of combination or conspiracy under the Sherman Act. It is what separates what is permitted from what is forbidden. To hold it illegal for persons in the same business and same trade organization, after exchanging information and views, to act in the same way, but independently of each other, on buying, selling, or prices, would extend the scope of the act beyond anything heretofore decided and beyond its proper meaning, and would cause the greatest confusion and uncertainty."

The defendants' requests numbered 16 to 21, both inclusive (R., pp. 670-2), and 34 to 38, both inclusive (R., pp. 676-7), and 42, 44 and 45 (R., pp. 679-680), all embody this idea. They were all refused by the Court on the ground that they were covered by its charge, and the defendants duly excepted. Typical examples of these requests are as follows:

> "36. To find any defendant guilty of being a party to a combination, the jury must be satisfied beyond a reasonable doubt that such member was not merely following advice as to price or trade practices which he was at liberty to either follow or disregard; but the jury must find that such defendant entered into some form of agreement or understanding which in some way limited or restricted his liberty of action and placed him under some form of obligation to other defendants as to

the fixing or maintenance of prices or the determination of his trade practices."

"45. If the jury find from the evidence that there was no obligation express or implied imposed by any combination or agreement upon the defendants or any of them to deal either with jobbers or with retailers, but that each defendant was entirely free to act according to his own business policy in this regard, they must find the defendants not guilty upon the second count of the indictment."

There can be no denial of the correctness of the law set out in these requests. The Court did not refuse the requests on the ground that they embodied bad law, but deemed that they were properly covered by its charge.

The Court emphasized the error of refusing these requests to charge by the following portion of its charge (R., p. 695, fols. 2084-5):

> "Nor is it necessary to the existence of an unlawful combination that there be any obligation assumed by the parties thereto to keep their promises or abide by their understanding among themselves. The law would not enforce such a promise if made because it would be illegal. Nor need there by any penalty attaching to any violation of the agreement by a party to it."

It is true that in certain portions of its charge the Court made such pronouncements as the following (R., p. 703, fol. 2109):

> "If, therefore, you find from all the evidence bearing on the subject some promise, either express or implied, or any assent to the proposition that the defendants should conform their conduct to some prescribed rule the aim and purpose of which was to restrict their sales to jobbers only, then under the law the defendants are guilty of a combination and conspiracy to restrain trade."

The effect of the charge was to render the whole subject entirely obscure and leave the jury uncertain whether there

need be any obligation or understanding among the defendants or not.

The Court had in effect told the jury that they could convict if they found an agreement imposing some sort of obligation upon the deefndants; and told the jury that they could convict without finding such an agreement; and after thus leaving the jury with the general impression that they could convict if they did not find an agreement, he again refused the defendants' request to him to tell the jury definitely that they could not convict unless they should find some promise or agreement among the defendants. This occurred after the charge had been delivered (R., p. 724, fol. 2172):

> Defendants' Counsel: "I except to that portion of Your Honor's charge in which Your Honor charged the jury that if they find some promise on the part of the defendants or any of them, was made to conform to some class of conduct dealing with jobbers, they then had entered into a combination. I ask Your Honor to charge the converse of that. If their conduct was not dictated by some promise or agreement to conform themselves to some course of conduct but the mere following up of advice, the defendants would not be guilty of entering into a conspiracy.
>
> The Court: You asked that in your requests and I have refused them.
>
> Mr. Marshall: I except."

(*b*) Along this line may be considered certain rulings of the court which had further tended to confuse the minds of the jury as to whether they could find the defendants guilty without finding that their conduct was actuated by agreement.

Some of the defendants offered evidence that their conduct was not the result of any agreement or sense of obligation, which the court excluded (R., pp. 220-1, fols. 658-662; pp. 325-7, fols. 975-7; p. 327, fols. 980-981; p. 342, fol. 1025). This was clearly error. The accused in a criminal case is entitled to testify as to his intent, motive or belief, where these are

material issues. *Wigmore on Evidence* (2d Ed.), sec. 581; *Stockdale's case* (Eng. H. L. 1789), 22 How. St. Tr. 237; *Crawford* v. *U. S.*, 212 U. S. 182, 202-3, 205; *Sparks* v. *U. S.* (C. C. A., 6th Circ., 1917), 241 Fed. 777, 791; *Buchanan* v. *U. S.* (C. C. A., 8th Circ., 1916), 233 Fed. 257, 259; *Heap* v. *Parish* (Ind., 1885), 3 N. E. 549, 551. Here the jury were asked to infer from defendants' conduct that they acted pursuant to an agreement, combination, or conspiracy. The rule that a defendant may testify to his motives applies with especial force to such a situation, and the evidence is admitted to rebut the inference which his conduct suggests. *Macy* v. *St. Paul & D. Ry. Co.* (Minn., 1886), 28 N. W. 249; *Crawford* v. *U. S.*, 212 U. S. 182, 205; *McKown* v. *Hunter* (1864), 30 N. Y. 624, 627; *State* v. *King* (1882), 86 N. C. 603.

In the last mentioned case the court said (p. 606):

> "Where the acts themselves are equivocal and become criminal only by reason of the intent with which they are done, both must unite in order to constitute the offense, and both facts must be proved in order to" (support) "a conviction. In such case, unless the intent is proved, the offense is not proved. As the criminal intent may be, and usually is inferred from the declaration and conduct of the accused, he is permitted to disavow the imputed purpose, and repel the presumption." (Italics ours.)

Similarly, where acts are not criminal unless done by agreement, the accused should be permitted to testify as to whether or not in doing them he was actuated by any agreement to repel any inference or presumption of agreement that might otherwise arise from such acts.

The exclusion of this class of testimony is, we submit, indefensible error, in the highest degree prejudicial. The court is asked by the Government to approve and affirm a conviction obtained when the defendants—when called as witnesses—were not allowed to deny their guilt.

One example may be quoted to show the character of these rulings. The witness Campbell, President of the Trenton

Potteries Company, was the first witness called for the defense (R., p. 320), and, after he had stated how he fixed the prices for his company, the following occurred on his direct examination (R., pp. 325-326):

> "Q. Will you please state whether or not in fixing prices you are actuated or motivated in any way by any combination or agreement with anybody whatever?
>
> "Mr. Podell: I submit that is calling for the witness' conclusion as to what motivates or actuates him.
>
> "The Court: I think so, Mr. Marshall. Objection sustained.
>
> "Mr. Marshall: I except. That is exactly what the company, that he is president of, is charged with doing. I asked him.
>
> "The Court: That is your substantive defense, and you are called upon, with your witnesses, to pursue the usual and ordinary and proper method of eliciting the facts.
>
> "Mr. Marshall: I except to your Honor's ruling.
>
> "Exception to the defendants."

In other words he was allowed to state the reasoning by which he was actuated in fixing prices. But he was not allowed to deny that he was actuated by the agreement charged against him in the indictment.

Conclusion.

It is respectfully but confidently submitted that when the record is read as a whole, the court will conclude that, even if judgment is not arrested, the defendants ought at least to have another trial.

They have been convicted in what the Circuit Court of Appeals properly characterizes as a "transplanted litigation," in a jurisdiction where not one of them resides and where it is not even contended that their alleged combination or conspiracy was formed.

They have been convicted in spite of the frank conces-

sion of the Government that neither the defendants, nor any of them, were either profiteers at the expense of the public, or cut-throat competitors to the detriment of producers not members of their group.

They have been convicted under an indictment which failed to apprise them of the exact nature of the case which they were to meet.

They have been convicted following the exclusion of relevant evidence and the admission of matter which should have been excluded.

Their conviction followed a series of rulings and a charge by the learned trial judge, which ascribed to the Sherman Act a machine-like operation at variance with the reasonable interpretation which this court has declared it should receive.

Jail sentences imposed upon citizens of standing, for conduct which, if in violation of the law, is neither alleged nor proved to have been damaging to the public or to competitors, will lead this court to scrutinize with exceeding great care the record upon which they are based.

CHARLES E. HUGHES,
GEORGE WHARTON PEPPER,
EDWARD L. KATZENBACH,
GEORGE H. CALVERT,
JOHN W. BISHOP, JR.,
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of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 27.—October Term, 1926.

United States, Petitioner, *vs.* The Trenton Potteries Co., et al. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 21, 1927.]

Mr. Justice Stone delivered the opinion of the Court.

Respondents, twenty individuals and twenty-three corporations, were convicted in the district court for southern New York of violating the Sherman Anti-Trust Law, Act of July 2, 1890, c. 647, 26 Stat. 209. The indictment was in two counts. The first charged a combination to fix and maintain uniform prices for the sale of sanitary pottery, in restraint of interstate commerce; the second, a combination to restrain interstate commerce by limiting sales of pottery to a special group known to respondents as "legitimate jobbers." On appeal, the court of appeals for the second circuit reversed the judgment of conviction on both counts on the ground that there were errors in the conduct of the trial. This Court granted certiorari. 266 U. S. 597. Jud. Code, § 240.

Respondents, engaged in the manufacture or distribution of 82 per cent. of the vitreous pottery fixtures produced in the United States for use in bathrooms and lavatories, were members of a trade organization known as the Sanitary Potters' Association. Twelve of the corporate respondents had their factories and chief places of business in New Jersey; one was located in California and the others were situated in Illinois, Michigan, West Virginia, Indiana, Ohio and Pennsylvania. Many of them sold and delivered their product within the southern district of New York and some maintained sales offices and agents there.

There is no contention here that the verdict was not supported by sufficient evidence that respondents, controlling some 82 per cent. of the business of manufacturing and distributing in the United States vitreous pottery of the type described, combined

to fix prices and to limit sales in interstate commerce to jobbers.

The issues raised here by the government's specification of errors relate only to the decision of the court of appeals upon its review of certain rulings of the district court made in the course of the trial. It is urged that the court below erred in holding in effect (1) that the trial court should have submitted to the jury the question whether the price agreement complained of constituted an unreasonable restraint of trade; (2) that the trial court erred in failing to charge the jury correctly on the question of venue; and (3) that it erred also in the admission and exclusion of certain evidence.

Reasonableness of Restraint.

The trial court charged, in submitting the case to the jury that if it found the agreements or combination complained of, it might return a verdict of guilty without regard to the reasonableness of the prices fixed, or the good intentions of the combining units, whether prices were actually lowered or raised or whether sales were restricted to the special jobbers, since both agreements of themselves were unreasonable restraints. These instructions repeated in various forms applied to both counts of the indictment. The trial court refused various requests to charge that both the agreement to fix prices and the agreement to limit sales to a particular group, if found, did not in themselves constitute violations of law unless it was also found that they unreasonably restrained interstate commerce. In particular the court refused the request to charge the following:

"The essence of the law is injury to the public. It is not every restraint of competition and not every restraint of trade that works an injury to the public; it is only an undue and unreasonable restraint of trade that has such an effect and is deemed to be unlawful."

Other requests of similar purport were refused including a quotation from the opinion of this Court in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238.

The court below held specifically that the trial court erred in refusing to charge as requested and held in effect that the charge as given on this branch of the case was erroneous. This determination was based upon the assumption that the charge and refusals could be attributed only to a mistaken view of the trial judge, ex-

pressed in denying a motion at the close of the case to quash and dismiss the indictment, that the "rule of reason" announced in *Standard Oil Co.* v. *United States*, 221 U. S. 1 and in *American Tobacco Co.* v. *United States*, 221 U. S. 106, which were suits for injunctions, had no application in a criminal prosecution. Compare *Nash* v. *United States*, 229 U. S. 373.

This disposition of the matter ignored the fact that the trial judge plainly and variously charged the jury that the combinations alleged in the indictment, if found, were violations of the statute as a matter of law, saying:

". . . the law is clear that an agreement on the part of the members of a combination controlling a substantial part of an industry, upon the prices which the members are to charge for their commodity, is in itself an undue and unreasonable restraint of trade and commerce; . . ."

If the charge itself was correctly given and adequately covered the various aspects of the case, the refusal to charge in another correct form or to quote to the jury extracts from opinions of this Court was not error, nor should the court below have been concerned with the wrong reasons that may have inspired the charge, if correctly given. The question therefore to be considered here is whether the trial judge correctly withdrew from the jury the consideration of the reasonableness of the particular restraints charged.

That only those restraints upon interstate commerce which are unreasonable are prohibited by the Sherman Law was the rule laid down by the opinions of this Court in the *Standard Oil* and *Tobacco* cases. But it does not follow that agreements to fix or maintain prices are reasonable restraints and therefore permitted by the statute, merely because the prices themselves are reasonable. Reasonableness is not a concept of definite and unchanging content. Its meaning necessarily varies in the different fields of the law, because it is used as a convenient summary of the dominant considerations which control in the application of legal doctrines. Our view of what is a reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself. Whether this type of restraint is reasonable or not must be judged in part at least in the light of its effect on competition, for whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sher-

man Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition. See *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290; *Standard Oil Co.* v. *United States, supra; American Column Co.* v. *United States,* 257 U. S. 377, 400; *United States* v. *Linseed Oil Co.,* 262 U. S. 371, 388; *Eastern States Lumber Association* v. *United States,* 234 U. S. 600, 614.

The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies. Compare *United States* v. *Cohen Grocery Co.,* 255 U. S. 81; *Nash* v. *United States, supra.* Thus viewed the Sherman Law is not only a prohibition against the infliction of a particular type of public injury. It "is a limitation of rights, . . . which may be pushed to evil consequences and therefore restrained." *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, 49.

That such was the view of this Court in deciding the *Standard Oil* and *Tobacco* cases, and that such is the effect of its decisions both before and after those cases, does not seem fairly open to question. Beginning with *United States* v. *Trans-Missouri Freight Association, supra; United States* v. *Joint Traffic Association,* 171

U. S. 505, where agreements for establishing reasonable and uniform freight rates by competing lines of railroad were held unlawful, it has since often been decided and always assumed that uniform price-fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law, despite the reasonableness of the particular prices agreed upon. In *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 237, a case involving a scheme for fixing prices, this Court quoted with approval the following passage from the lower court's opinion, (85 Fed. 271, 293):

". . . the affiants say that, in their opinion, the prices at which pipe has been sold by defendants have been reasonable. We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract." See also, p. 291.

In *Swift & Co.* v. *United States,* 196 U. S. 375, this Court approved and affirmed a decree which restrained the defendants "by combination, conspiracy or contract [from] raising or lowering prices or fixing uniform prices at which the said meats will be sold, either directly or through their respective agents." In *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373, 408, decided at the same term of court as the *Standard Oil* and *Tobacco* cases, contracts fixing reasonable resale prices were declared unenforcible upon the authority of cases involving price-fixing arrangements between competitors.

That the opinions in the *Standard Oil* and *Tobacco* cases were not intended to affect this view of the illegality of price-fixing agreements affirmatively appears from the opinion in the *Standard Oil* case where, in considering the *Freight Association* case, the court said (p. 65):

"That as considering the contracts or agreements, their necessary effect and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made. That is to say, the cases but decided that the nature and character of the contracts, creating as they did a conclusive presumption which brought them within the statute, such result was not to be disregarded by the

substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made."

And in *Thompson* v. *Cayser*, 243 U. S. 66, 84, it was specifically pointed out that the *Standard Oil* and *Tobacco* cases did not overrule the earlier cases. The decisions in *Maple Flooring Association* v. *United States*, 268 U. S. 563, and in *Cement Manufacturers' Protective Association* v. *United States*, 268 U. S. 588, were made on the assumption that any agreement for price-fixing, if found, would have been illegal as a matter of law. In *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 272 U. S. —, we upheld orders of the Commission forbidding price-fixing and prohibiting the use of agreed price lists by wholesale dealers in interstate commerce, without regard to the reasonableness of the prices.

Cases in both the federal and state courts[1] have generally proceeded on a like assumption, and in the second circuit the view maintained below that the reasonableness or unreasonableness of the prices fixed must be submitted to the jury has apparently been abandoned. See *Poultry Dealers' Association* v. *United States*, 4 Fed. (2d) 840. While not necessarily controlling, the decisions of this Court denying the validity of resale price agreements, regardless of the reasonableness of the price, are persuasive. See *Dr. Miles Medical Co.* v. *Park & Sons Co., supra; Boston Store of Chicago* v. *American Graphophone Co.*, 246 U. S. 8; *United States* v. *Schrader's Sons*, 252 U. S. 85; *Federal Trade Commission* v. *Beechnut Packing Co.*, 257 U. S. 441.

Respondents rely upon *Chicago Board of Trade* v. *United States, supra*, in which an agreement by members of the Chicago Board of

[1]The illegality of such agreements has commonly been assumed without consideration of the reasonableness of the price levels established. *Loder* v. *Jayne*, 142 Fed. 1010; *Craft* v. *McConoughy*, 79 Ill. 346; *Vulcan Power Co.* v. *Hercules Powder Co.*, 96 Cal. 510; *Johnson* v. *People*, 72 Colo. 218; *People* v. *Amanna*, 203 App. Div. 548; see *Trenton Potteries Co.* v. *Oliphant*, 58 N. J. Eq. 507, 521; *Beechley* v. *Mulville*, 102 Iowa 602, 608; *People* v. *Milk Exchange*, 145 N. Y. 267 (purchase prices). In many of these cases price-fixing was accompanied by other factors contributing to the illegality.

Upon the precise question, there has been diversity of view. *People* v. *Sheldon*, 139 N. Y. 251; *State* v. *Eastern Coal Co.*, 29 R. I. 254, 256, 265; Pope, *Legal Aspect of Monopoly*, 20 Harvard Law Rev. 167, 178; Watkins, *Change in Trust Policy*, 35 Harvard Law Rev. 815, 821-3; (reasonableness of prices immaterial) *contra: Cade & Sons* v. *Daly*, [1910] 1 Ir. Ch. 306; *Central Shade Roller Co.* v. *Cushman*, 143 Mass. 353; *Skrainka* v. *Scharringhausen*, 8 Mo. App. 522; *Dueber Watch Case Mfg. Co.* v. *Howard Watch Co.*, 55 Fed. 851.

Trade controlling prices during certain hours of the day in a special class of grain contracts and affecting only a small proportion of the commerce in question was upheld. The purpose and effect of the agreement there was to maintain for a part of each business day the price which had been that day determined by open competition on the floor of the Exchange. That decision, dealing as it did with a regulation of a board of trade, does not sanction a price agreement among competitors in an open market such as is presented here.

The charge of the trial court, viewed as a whole, fairly submitted to the jury the question whether a price-fixing agreement as described in the first count was entered into by the respondents. Whether the prices actually agreed upon were reasonable or unreasonable was immaterial in the circumstances charged in the indictment and necessarily found by the verdict. The requested charge which we have quoted, and others of similar tenor, while true as abstract propositions, were inapplicable to the case in hand and rightly refused.

The first count being sufficient and the case having been properly submitted to the jury, we may disregard certain like objections relating to the second count. The jury returned a verdict of guilty generally on both counts. Sentence was imposed in part on the first count and in part on both counts, to run concurrently. The combined sentence on both counts does not exceed that which could have been imposed on one alone. There is nothing in the record to suggest that the verdict of guilty on the first count was in any way induced by the introduction of evidence upon the second. In these circumstances the judgment must be sustained if either one of the two counts is sufficient to support it. *Claassen* v. *United States*, 142 U. S. 140; *Locke* v. *United States*, 7 Cranch 339, 344; *Clifton* v. *United States*, 4 How. 242, 250.

Question of Venue.

The trial court instructed the jury in substance that if it found that the respondents did conspire to restrain trade as charged in the indictment, then it was immaterial whether the agreements were ever actually carried out, whether the purpose of the conspiracy was accomplished in whole or in part, or whether an effort was made to carry the object of the conspiracy into effect. The court below recognized that this charge was a correct statement of the general proposition of law that the offensive agreement or

not to sell second grade or Class "B" pottery in the domestic market. The government offered evidence, including the testimony of the secretary of the respondents' association, to show that a distinct association of jobbers of pottery was cooperating in this effort and that its secretary had tendered his active assistance to confine the sale of this class of pottery to the export trade. On cross-examination of the secretary of the respondents' association, the fact was brought out that at one time twenty out of twenty-four members were selling Class "B" pottery in the domestic market. On re-direct examination, the government asked questions of the witness tending to show that at about that time the secretary of the Jobbers' Association had been called for examination before a committee of the New York Legislature, conducting a general investigation into restraints of trade and extortions in connection with the building industry in New York City and vicinity, an investigation of which the lower court took judicial notice. It was held below and it is urged here that because of the known character of the investigation, the evidence should have been excluded because it improperly "smirched" the witness by showing that he had relations with an "unreliable" person. But the brief statement which we have given of the record makes it plain that the testimony sought was material in explaining the failure of the members of the respondents' association at that time to confine their sales of Class "B" pottery to the export market as promised. The inquiry was not directed to the impeachment of the government's own witness. Its purpose was to dispel the adverse impression possibly created by the cross-examination. Such matters should not be excluded merely because they tend to discredit the witness by showing his relations with unreliable persons.

Respondents called numerous witnesses who were either manufacturers or wholesale dealers in sanitary pottery, to show that competition existed among manufacturers, particularly the respondents, in the sale of such pottery. On direct examination these witnesses were asked in varying form, whether they had observed or noted competition among the members of the association. The questions were objected to and excluded on the ground that they were too general and vague in character and called for the opinion or conclusion of the witness.

Whenever the witness was asked as to the details of transactions showing competition in sales, his testimony was admitted and the introduction of records of prices in actual transactions was

facilitated by stipulation. Whether or not such competition existed at any given time is a conclusion which could be reached only after the consideration of relevant data known to the witness. Here the effort was made to show the personal conclusion of the witness without the data and without, indeed, showing that the conclusion was based upon knowledge of relevant facts. Hence, the offered evidence, in some instances, took the form of vague impressions, or recollections of the witness as to competition, without specifying the kind or extent of competition.

A certain latitude may rightly be given the court in permitting a witness on direct examination to testify as to his conclusions, based on common knowledge or experience. Compare *Erie R. R.* v. *Linnekogel*, 248 Fed. 389; 2 Wigmore, § 1929. Even if these questions could properly have been allowed here, we cannot say that the discretion of the court was improperly exercised in excluding the conclusions of the witnesses as to competitive conditions when full opportunity was given to prove by relevant data the conditions of the industry within the period in question.

Other objections urged by respondents to the sufficiency of the indictment and charge have received our consideration but do not require comment.

It follows that the judgment of the circuit court of appeals must be reversed and the judgment of the district court reinstated.

Reversed.

Mr. Justice VAN DEVANTER, Mr. Justice SUTHERLAND and Mr. Justice BUTLER dissent.

Mr. Justice BRANDEIS took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.